

25613
R E P O R T S

O F

C A S E S

ARGUED and ADJUDGED in the COURTS of

K I N G ' s B E N C H

A N D

C O M M O N P L E A S ,

In the R E I G N S of

The late King *William*, Queen *Anne*, King *George* the First,
and King *George* the Second.

Taken and collected

By the Right Honourable *ROBERT* Lord *RAYMOND*,
late Lord Chief Justice of the COURT of KING's BENCH.

VOL. II.

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and J. BUTTERWORTH, W. BROWN, W. CLARKE
and Son, and J. GALBRAITH.

MDCCLX.



TO THE
RIGHT HONOURABLE
SIR RICHARD PEPPER ARDEN, KNT.
MASTER OF THE ROLLS,
AND
One of his MAJESTY'S most Honourable PRIVY COUNCIL,
THIS EDITION
OF THE
REPORTS of LORD RAYMOND,
IS WITH
GRATITUDE, RESPECT AND DEFERENCE,
INSCRIBED
BY
The Editor.

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THE EDITOR.

A
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OF THE
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A

L I S T

O F

The Chief Officers in the Law,

AT THE

Time of the Death of King *William III.*

8 March 1701-2.

SIR Nathan Wright knight, keeper of the great seal of England, the same day on which King William III. died, viz. the eighth of March, delivered the great seal into the hands of Queen Anne, being then sitting in council, and the Queen re-delivered it to him, with the title of Keeper of the great seal of England.

Sir John Trevor knight, master of the rolls, held his office for life, and therefore it was not determined by the demise of the king; but yet he accepted a new commission from the queen of the said office for his life.

The office of master of the rolls does not determine by the demise of the king.

Sir John Holt knight, chief justice of the king's bench, holding his office by writ, though it was *quamdiu se bene gesserit*, held it to be determined by the demise of the king, notwithstanding the act of 12 & 13 Will. 3. And therefore the queen in council gave orders, that he should have a new writ, which he received accordingly, and was sworn before the lord keeper of the great seal the Saturday following, viz. the fourteenth of March, chief justice of the king's bench.

Sir John Turton knight
Sir Littleton Powys knight
Sir Henry Gould knight

} justices of the king's bench.

Vol. II.

B

Sir

*A list of the chief officers in the law**Sir Thomas Trevor knight, chief justice of the common pleas.**Sir Edward Nevill knight**Sir John Powell knight**Sir John Blencowe knight*} *justices of the common pleas.*

Henry Boyle esquire, chancellor of the exchequer, received a new commission, and was sworn in the court of exchequer, May 12 or 13.

*Sir Edward Ward knight, chief baron.**Sir Henry Hatsell knight**Robert Tracy esquire**Sir Thomas Bury knight**Sir Richard Simpson knight, curfitor baron.*} *barons of the exchequer.*

The right honourable Gray earl of Stamford, chancellor of the duty of Lancaster, was removed from the said office, and Sir John Levison Gower baronet, was made chancellor of the duchy, and took the oaths of the said office in council the twenty-first of April 1702.

*Sir William Wogan knight**Sir Nathaniel Bond knight*} *the king's ancient serjeants.**Edward Northey esquire, attorney general.**Sir John Hawles knight, solicitor general.**Sir Ambrose Philips knight**Sir George Hutchins knight**Sir Salathiel Lovell knight**Sir John Dainall knight**Sir Joseph Jekyll knight**Charles Whitaker esquire*} *king's serjeants.**John Conyers esquire,**Sir Nathaniel Powell baronet**William Cowper esquire**Aglionby esquire**Edward Clerk esquire**William Farrer esquire*} *king's counsel.*

Entwistle esquire, vice-chancellor of the duchy was removed, and John Weddall esquire promoted to the said office, who died 1703, and was succeeded by Mr. Brennard of Grays Inn.

Edward

at the demise of King William III.

749

Edward Northey *esquire*, attorney of the duchy of Lancaster.

Ashurst *esquire*, attorney of the county palatine, was removed, and Robert Starkey *esquire* promoted to the said office.

Justices of Wales.

Sir Joseph Jekyll knight, chief justice (a) } justices of Chester, Flint, &c.

Sir Salathiel Lovell knight

(a) Note, it was held that his office did

not determine by the demise of the king; otherwise he would have been removed, great interest being made for the said office by Mr. Conyers.

Mr. serjeant Neeve
Francis Floyd *esquire*

} justices of West Wales.

Mr. serjeant Hook
William Peasley *esquire*

} justices of North Wales.

Mr. serjeant Pawlett
Robert Price *esquire*

} justices of South Wales.

Anno regni Annæ reginæ Angliæ, &c.
primo 1701-2.

Heron vers. Treyme.

Under a covenant to make an assurance at the costs of the covenantee, he is bound to tender the costs before he can call upon the covenantor to make the assurance.

D. acc. 12 Mod. 400. Holt 177. vide Com. Condition. H. 2d Ed. vol. 2. p. 455, 456.

But if the particular assurance is not ascertained, the covenantor must give

the covenantee notice what assurance he will make. D. acc. 12 Mod. 400. 401. Holt 177.

IN covenant brought by *Heron* against *Treyme* it was ruled by *Holt* chief justice of the king's bench upon evidence at the trial at *Lent* assizes at *Southwark* March 27. 1 *Annæ* 1702, that if *A.* covenants with *B.* to make farther assurance to *B.* at the costs of *B.* *A.* ought to give notice to *B.* what sort of assurance he will make, and then *B.* ought to tender the costs, and then *A.* ought to make the assurance. But if the covenant is, that *A.* shall make a new demise to *B.* at the costs of *B.* (as the covenant, upon which this action was brought, was) or any particular assurance specified in the covenant; then *B.* ought first to tender the costs, and then *A.* ought to make the assurance. For in the former case *B.* cannot know what costs will be sufficient to tender, before he knows, what sort of assurance *A.* will make; but in the latter case by the inspection of the covenant itself he will know what sort of assurance will be made.

the covenantee notice what assurance he will make. D. acc. 12 Mod. 400. 401. Holt 177. Vide Com. Condition. H. 2d. Ed. vol. 2. p. 455. Vide *Jenk.* 305. pl. 7.

Little vers. Heaton.

S. C. Salk. 259. Holt 264.

In an ejectment upon a clause for a re-entry 'tis not necessary to prove an actual entry. R. acc. 3 Keb. 218. pl. 26. 1. Vent. 248. Dougl. 460. D. acc. Burr. 1897. Sed vide 1 Vent. 282. Salk. 259. Holt 264.

AN ejectment was brought by the lessor against the lessee for years of land, &c. rendering rent, for breach of the condition contained in the lease for non-payment of the rent (there being a clause of re-entry in the lease for non-payment thereof.) And upon not guilty pleaded, it being tried before *Holt* chief justice at the assizes at *Southwark* Mar. 26, 1702, 1 *Ann. R.* after confession of lease, entry, and ouster, Mr. *Braderick* for the defendant insisted upon it, that this confession by the defendant of entry, &c. did not extend to the confession of an entry, that was necessary to make title to the lessor of the plaintiff; but only an entry to make his lease to the plaintiff good; and therefore that the plaintiff ought to prove an actual entry by the lessor of the plaintiff for

for the condition broken, before which he had not in point of law any title. And *Holt* chief justice said, that it was always held so until the time of *Hale* chief justice, and then it was ruled by *Hale* at the assizes in *Bucks*, that the general confession of lease, entry, and ouster, was sufficient in such case, and that the plaintiff should not be driven to prove any actual entry by his lessor; but he reserved it for his more deliberate opinion, a case being made of it. And afterwards it being moved in the king's bench, the judges there were of the same opinion: and afterwards in the time of *Scroggs* chief justice, in ejectment between the lessee of *Sir Robert Pye* and *Billing* it was held accordingly in the king's bench: but notwithstanding these cases, very soon after the revolution the same point arose before himself in evidence upon a trial at *nisi prius* at *Guildhall*, and he doubted of it, and reserved it as a point for his opinion, and caused it to be moved in the king's bench, where the three *puisne* judges, viz. *Sir William Dolben*, *Sir William Gregory*, and *Sir Gyles Eyre* held, that the general confession of entry by the defendant was enough, and that the plaintiff should not be driven to prove an actual entry by his lessor, according to the practice ever since the aforesaid opinion of *Hale* chief justice, but he doubted of it himself then. But in this present case, he said, that it seemed to be settled, and therefore he would not unsettle it; and therefore he ruled the present case according to the opinion of *Hale* aforesaid.

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v.
HEATON.

This was the opinion of all the judges in *Hilary* term 1703. But the demand of the rent must be proved notwithstanding the confession of the entry. *Ex relatione* Mr. justice Blencowe. Vide 4 G. 2. c. 28.

Jones *vers.* Hammond.

Pleadings, Lutw. 124.

IN an action upon the case brought by the plaintiff against the defendant for stopping a way, the plaintiff declared, that he was possessed of the close of *A.* and that the defendant was possessed of the close of *B.* and that the plaintiff *habuit, et habere debuit*, a way over the close of *B.* &c. Upon not guilty pleaded, upon the evidence at the trial, *March* 19, 1701, at *Lent* assizes at *Maidstone* 1 *Annæ reginæ*, it was objected by *Mr. Broderick*, that the plaintiff ought to be nonsuit; because it appeared by the plaintiff's declaration, that the defendant was possessed of the close of *B.* and for that reason such a general declaration of a *habuit et habere debuit* is not good, but the plaintiff ought to shew his title to the way; for such a general declaration is only good against a wrong doer; but in this case if the plaintiff recovered, it might be, that the court at *Westminster* would hold, that this defect was aided by the verdict, because they would intend, that the plaintiff shewed his title to the way in evidence. But *Holt* chief justice said, that the defendant had good reason to have demurred; but he had au-

In an action for obstructing a way, if it appears upon the declaration that the defendant is possessed of the land over which the way is claimed, the plaintiff ought to set forth his title to the way. Vide *Com.* 7. Str. 6. R. cont. *Lutw.* 119. 2 *Vent.* 186. Vide etiam 3 *Lev.* 266. 6 *Mod.* 313. post 1093. and ante 266. But no objection can be taken at the trial because he does not do so.

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HAMMOND.

thority only to try the issue, and the plaintiff had no need to prove more than was contained in the declaration; and for that reason he over-ruled Mr. *Broderick's* objection, and the plaintiff recovered a verdict.

Broughton *vers.* Harpur.

If a man marries a second time before his first wife dies, his first wife is not a competent witness to prove her marriage.
R. acc. Raym. 1, 2. T. R. 263. D. acc. 1 Hale. P. C. 693.
Vide 2 Cha. Caf. 39.

IN ejectment, the plaintiff made title to his lessor to the lands in question as son and heir of *Jerome Jacques* and *Hannah* his wife, in right of *Hannah*. The defendant gave in evidence, that *Jerome Jacques* was married before he was married to *Hannah*; and the woman, to whom it was supposed he was married before, was produced at the trial, *summer assizes 13 Will. 3. at Maidstone*, to prove this marriage. The counsel for the plaintiff opposed her testimony, because she swore for her advantage, *viz.* to have a husband, the husband then being living. But nevertheless *Gould* justice of the king's bench, then judge of assize, admitted her testimony. But afterwards the same cause upon the same title between the same parties was tried before *Holt* chief justice, at the assizes in *March at Maidstone, 1 Ann. reg.* and he refused, after debate, to admit the former wife to be witness for this purpose; but upon other evidence the former marriage was proved to the satisfaction of the jury, being gentlemen, whereupon they found a verdict for the defendant. But in the former trial before *Gould* justice the jury found a verdict for the plaintiff.

Skinner *vers.* Uphaw.

A carrier may detain goods for the carriage.
D. acc. post 867.
Arg. Burr. 2826.

THE plaintiff brought an action of trover against the defendant, being a common carrier, for goods delivered to him to carry, &c. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, &c. and therefore he retained them. And it was ruled by *Holt* chief justice at *Guildhall*, (the case being tried before him there) *May 12. 1 Ann. reg. 1702.* that a carrier may retain the goods for his hire; and upon direction, the defendant had a verdict given for him.

The Governor and Company of the Bank of
England *vers.* Glover.

IN *indebitatus assumpsit* brought by the plaintiffs against the defendant for 454*l.* 18*s.* and 3*d.* lent to the defendant by the plaintiffs, and another count for 454*l.* 18*s.* and 3*d.* laid out at the request of the defendant for the use of the defendant; and *non assumpsit* pleaded; upon the evidence at the trial before Holt chief justice, at the sittings at Guildhall, Pasch. 1 Ann. the case was thus. The defendant, Jan. 31. 1700. brought a note of Mr. Shepherd the goldsmith, payable to Robert Stamper for 454*l.* 18*s.* 3*d.* to the bank of England, and prayed Mr. Maddocks the cashier of the bank to give him a *specie* bank note payable to the said Stamper for the said note of Shepherd; which Mr. Maddocks refused, but told the defendant, that if he would promise to pay the bank the 454*l.* 18*l.* 3*d.* in case Shepherd did not pay the said note, he would give him a *specie* bank note payable to himself for the said sum; to which the defendant agreed. Whereupon Mr. Maddocks accepted Shepherd's note, and gave the defendant Glover a *specie* bank note of 454*l.* 18*s.* and 3*d.* This was done upon the Friday. The Monday after, this note of Shepherd was sent to him to be paid, and Shepherd refused to pay it. In the mean time Glover gave this bank note to J. S. for a debt owing by him to J. S. and J. S. received the 454*l.* 18*s.* and 3*d.* of the bank. And after debate by the counsel of both sides, Holt chief justice was of opinion, that this evidence did not maintain the action. For (by him) this was not money lent, nor laid out for the use of the defendant; but it was a buying of the note of Shepherd with a warranty of it from the defendant; and therefore the plaintiffs might well maintain a special action, but not a general *indebitatus assumpsit*. It was urged by the plaintiffs' counsel, that this note was only a *depositum* or pledge. But to that the chief justice answered, that that could not be, because it was not redeemable by the defendant, and redemption is incident to the nature of a pledge. The plaintiffs were nonsuit.

Upon a promise by the person who gets cash for a note to pay it if the maker shall not, a special action may be maintained. An action for money lent, or laid out, not. All pledges are redeemable. Vide post 917. 24 G. 3. f. 2. c. 42. f. 6. Com. Dig. Mortgage. A. 2d. Edit. vol. 4 p. 252.

Jennings *vers.* Rogers.

IN ejectment upon evidence at *nisi prius* at Lent assizes at Southwark, the case appeared to be thus. A. was tenant of the lands for life, remainder to B. in tail, remainder to C. for life, &c. B. leased and released all his estate to A. then a *præcipe* was brought against A. A. vouched B. and C. and they vouched the common

A recovery in which the tenant in tail is vouched, and vouches, jointly with another person, bars the entail. R. acc. Salk.

570. Holt 618. Pig. 176. and vide Cruise 206, 207, 210, 211. 1 Vent. 303. 358. Plowd. 514. Skian. 3. 18. Vin. 213. pl. 3. 214. pl. 6. but see also Pig. 35, 36. Cruise 205, 206.

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vouchee, and the recovery was perfected. The question was, if this recovery was good, to bar the intail? And Holt held, that it was, though C. had but an estate for life. But he reserved it for a point for his farther consideration. See *Plowd. Com. Manxel's case* 504. *Eare v. Snow*; and 3 Co. 5. b. *Cuppledike's case*. And afterwards he gave his opinion accordingly, after consideration had.

Term adjourn-
ed.

Memorandum, That the twenty-third of April being appointed for the Queen's coronation, which was to happen on Thursday the second day of the term (quindena Paschæ being the Monday before) one judge of each court went to Westminster, to keep the effoins of quindena Paschæ, and there received a writ of adjournment, to adjourn the term from quindena Paschæ until tres Paschæ; which being read in the several courts, they returned. And afterwards at the appearance day of tres Paschæ all the judges sat at Westminster, and dispatched business.

Easter Term

I Annæ reginæ, B. R. 1702.

Sir John Holt Chief Justice.

Sir John Turton

Sir Littleton Powys

Sir Henry Gould

} Justices.

Jacob *vers.* Dallow.

S. C. Salk. 551.

IN a declaration upon attachment upon a prohibition, the plaintiff shewed a right in him and all those whose estate he had to a seat in the church, and that the defendant surmising a usage to sit in the said seat, time whereof, &c. had libelled against him for having disturbed him in sitting there; that the plaintiff had denied the said usage in the spiritual court, and that the judge of the spiritual court had nevertheless refused to allow it, &c. The defendant in bar pleaded the said usage, &c. and traversed the prescription alleged by the plaintiff, to have a seat in the said church, &c. The plaintiff demurred. And the defendant joined in demurrer. And now Mr. Eyre for the plaintiff urged, that though the plaintiff by his demurrer had confessed, that he had not any title to his seat by prescription, yet the defendant founding his libel in the spiritual court upon a custom, which is not triable there, but at common law, the defendant could not have a consultation; and therefore his traverse is ill, for it is not material, whether the plaintiff has any title or not. But since he has denied the custom alleged by the defendant in his libel, and the spiritual court has not power to try it, the prohibition must stand. And he cited *Hestl.* 94. in the case of *Eaton v. Ayliffe*, it is said by *Richardson* chief justice, that if title be made in the spiritual court to a seat in the church by prescription, it is merely *coram non iudice*; and *Noy* 78. *Carlton v. Hutton*, where it is said, that a seat may be claimed by prescription, and an action upon the case lies for disturbance of the enjoyment of it at common

A prohibition shall not be granted to a court because it has no power to try one of the facts stated in the pleadings, unless such fact is denied.
R. acc. ante 578. and see the cases there cited.

A man may libel in the spiritual court for disturbance in a pew he claims in a church by prescription.
Vide 12. Co. 105. Moor. 878.
1 Sid. 88. pl. 6.
Burn's Eccl. Law, ch. vii. 15. 1st. Ed. vol. 1. p. 259.

Or of which he has a bare possession only, if the party against whom the suit is instituted has no title to the seat. Vide 1 Wil. 326.

3 T. R. 428. Com. Dig. Ecclesie. G. 3. 2d. Ed.

law.

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(a) Vide ante
579. and the
cases there cited.

law. He cited also Sir T. Jones 3. *Bradbury v. Burch*, as a case strong to the purpose; where in an action upon the case for disturbing him in the enjoyment of a seat in a parish church, which seat the plaintiff claimed as appendant to his house by prescription, without alleging repairs, the defendant pleaded prescription in himself and his ancestors, and traversed the prescription alleged by the plaintiff; and adjudged, that the traverse taken by the defendant was impertinent, and that the case rested solely upon the disturbance; and judgment was there after verdict given for the plaintiff. *Sed non allocatur*. For per Holt chief justice, the defendant, if he pleases, may sue upon his prescription in the ecclesiastical court, to have his possession quieted, which the ordinary ought to do upon the foundation of his usage to have sat there; for one may sue upon a prescription in the spiritual court, if it is not denied, as upon a *modus decimandi*; or for (a) a pension due by prescription, and the spiritual court will give judgment upon it. Then in this present case the prescription, upon which the defendant libelled, is not denied by the plaintiff; and therefore the spiritual court may well proceed upon it. Then as to the prescription alleged by the plaintiff in his declaration, it is confessed to be false by the demurrer, and consequently it appears that the plaintiff had no right to the seat; and therefore he ought not to have a prohibition, though the plaintiff in the spiritual court had only a bare possession; for the foundation upon which the prohibition ought to be granted, is the invasion that is made by the suit in the ecclesiastical court upon the temporal prescriptive right of the defendant; but in this case there is none such; and then if the defendant had no extraordinary title, yet he had the possession; and being disturbed in it, the ordinary has consueance of the disturbance, and may settle and quiet the possession according to the usage, no temporal right being infringed. And therefore (by him) a consultation ought to be granted. And a consultation was granted by the whole court.

Regina vers. Ewer.

S. C. 7 Mod. 9.

Where part of the condition of a recognisance is to give a notice to a man or his clerk, 'tis a fatal variance to state it to have been to give notice to him and his clerk. S. C. 3 Salk. 69. A recognisance taken by a judge of B. R. upon the removal of an indictment in more than the sum mentioned in 5 W. & M. c. 11. is good. S. C. Salk. 363. Holt 612. Vide Str. 1165. Burr. 10.

A *Scire facias* was sued against the defendant upon a recognisance acknowledged by him before one of the judges of this court, upon the granting of a *certiorari* to remove an indictment found at the general quarter sessions of the peace before the justices of the peace there, &c. The defendant (a) prayed oyer of the recognisance, and of the condition thereof; and they being entred in *hæc verba*, the defendant demurred; and judgment was given for the defend-

ant. S. C. 3 Salk. 69. A recognisance taken by a judge of B. R. upon the removal of an indictment in more than the sum mentioned in 5 W. & M. c. 11. is good. S. C. Salk. 363. Holt 612. Vide Str. 1165. Burr. 10.

(a) From the report in 7 Mod. 9. it should seem the defendant did not pray oyer.

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ant, for a manifest variance between the recognisance mentioned in the *scire facias* and the recognisance entered in *hæc verba*, inasmuch as it was mentioned to be part of the condition of the recognisance recited in the *scire facias*, that the defendant should give notice of trial *prosecutori et ejus clerico*; but the condition of the recognisance entered upon the *oyer* prayed was, that the defendant should give notice of trial *prosecutori aut ejus clerico*. Mr. King counsel for the defendant took another exception, *viz.* that this recognisance varied from the form prescribed by the act of parliament lately made, in this, that the said statute appoints that the sum shall be 20*l.* but this recognisance is of 40*l.* But to that exception the chief justice answered, that notwithstanding that, the recognisance will be good by the common law; for before the 5 *W. & M. c. 11.* any judge of this court might have taken a recognisance with condition to prosecute, &c. And the constant practice in *London* and *Middlesex* for removal of indictments by *certiorari*, before the said statute was so; but the difference was, that after the said act, and before the act of 8 & 9 *W. 3. c. 33.* although such recognisance had been taken by a judge, yet that would not have made the *certiorari* a *superfedeas*: but since the last act, if a recognisance be taken by a judge to prosecute, and a *certiorari* granted, the *certiorari* will be as much a *superfedeas*, as if the recognisance had been taken by the justices of peace, according to 5 *W. & M. c. 11.*

Clerke *vers.* Martin.

THE plaintiff brought an action upon his case against the defendant upon several promises; one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another count was upon the custom of merchants, as upon a bill of exchange; and shewed, that the defendant gave a note subscribed by himself, by which he promised to pay — to the plaintiff or his order. Upon *non assumpsit* a verdict was given for the plaintiff, and intire damages. And it was moved in arrest of judgment, that this note was not a bill of exchange within the custom of merchants, and therefore the plaintiff, having declared upon it as such, was wrong; but that the proper way in such cases is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be good evidence of it. But it was argued by Sir *Bartholomew Shewer* the last *Michaelmas* term for the plaintiff, that this note, being payable to the plaintiff or his order, was a bill of exchange, inasmuch as by its nature it was negotiable; and that distinguishes it from a note payable to *J. S.* or bearer, which he admitted was not a bill of exchange, because it is not assignable nor in no part of them was given in respect of a particular count in the declaration is insensible. S. C. Salk. 129. 304.

A promissory note payable to *J. S.* or order is not a negotiable instrument within the custom of merchants. S. C. Salk. 129. R. acc. post 774. 825. 6 Mod. 29. Sed vide 3 & 4 Ann. c. 9.

Nor is a promissory note payable to *J. S.* or bearer *S.* But it is evidence of money lent to *J. S.* D. acc. 12 Mod. 380. Where intire damages are given it cannot be intended that unless that count

dorsable

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(a) Acc. Salk.
125.

dorsable by the intent of the subscriber, and consequently not negotiable, and therefore it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable: but here this bill is negotiable, for if it had been indorsed payable to J. N. J. N. might have brought his action upon it as upon a bill of exchange, and might have declared upon the custom of merchants. Why then should it not be before such indorsement a bill of exchange to the plaintiff himself; since the defendant by his subscription has shewn his intent, to be liable to the payment of this money to the plaintiff or his order; and since he hath thereby agreed, that it shall be assignable over, which is by consequence that it shall be a bill of exchange? That there is no difference in reason, between a note, which saith, "I promise to pay to J. S. or order, &c." and a note which saith, "I pray you to pay to J. S. or order, &c." they are both equally negotiable; and to make such a note a bill of exchange, can be no wrong to the defendant, because he, by the signing of the note, has (a) made himself to that purpose a merchant. 2 Vent. 292. *Sarsfield v. Witherly*, and has given his consent, that his note shall be negotiated, and thereby has subjected himself to the law of merchants. But Holt chief justice was *totis viribus* against the action; and said, that this note could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in *Lombard-street*, which attempted in these matters of bills of exchange to give laws to *Westminster-hall*. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method, as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarsfield v. Witherly*, he said, he was not satisfied with the judgment of the king's bench, and that he advised the bringing of a writ of error.

Gould justice said, that he did not remember, it had ever been adjudged, that a note, in which the subscriber promised to pay, &c. to J. S. or bearer, was not a bill of exchange. That the bearer could not sue an action upon such a note in his own name, is without doubt; and so it was resolved between *Horton* and *Coggs*, now printed in 3 Lev. 299. but that it was never resolved, that the party himself (to whom such note was payable) could not have an action upon the custom of merchants upon such a bill. But Holt chief justice answered, that it was held in the said case of *Horton v. Coggs*, that such a note was not a bill of exchange within the customs of merchants. And afterwards in this *Easter term* it was moved again, and the court continued to be of opinion against

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against the action. And then Mr. *Brantwaite* for the plaintiff urged, that if this note was not a bill of exchange within the custom of merchants, then the promise founded upon it was void; and then it could not be intended, that any damage was given by the jury for the breach of it, but all the damages must be intended to have been given upon the general *indebitatus assumpsit*. Holt chief justice said, that would be true, if it had been void by reason of its being insensible; but this matter is sensible enough, though not sufficient in law to raise a promise; and therefore one cannot intend, but that damages were given for it; and consequently that judgment must be arrested. And judgment was given, *quod querens nil capiat per billam, &c.* by the opinion of the whole court.

Potter *vers.* Pearson.

S. C. Salk. 129. Holt 33.

ERROR upon a judgment given by *nihil dicit* in *C. B.* in an action upon the case upon a bill of exchange upon the custom of merchants, in which the plaintiff declared that there was a custom in *London, &c.* that if a merchant signed a note, promising to pay to *J. S.* or his order, *&c.* that he became obliged by the custom to pay it, *&c.* And now Mr. *Acherley* attempted to make a distinction between this case and the case of *Clerke v. Martin, ante 757*; because that in the said case of *Clerke v. Martin* the custom was laid generally to be between all merchants, *&c.* of which the court will take notice, and consequently will take notice that there is not any such custom; but in this case the custom being confined to the merchants in *London*, the court cannot take any other notice of it than as it is pleaded, the which being confessed, by permitting judgment to pass by *nihil dicit*, must be looked upon by the court as true; and it not being void nor unreasonable, the judgment ought to be affirmed. *Sed non allocatur.* For *per curiam* it is a void custom, since it binds a man to pay money without any consideration. For the rule is, *ex nudo pacto non oritur actio.* And therefore the judgment was reversed.

A custom that a man who signs a note promising to pay money to another or his order, shall be obliged to pay it, is a void custom.

Meredith *vers.* Chute.

S. C. Salk. 24. but with some difference. 7 Mod. 12.

IN case upon *assumpsit* the plaintiff declared, that the defendant, in consideration that the plaintiff at the special request of the defendant *deliberasset* to the defendant *quandam notam*, by which one *Hurst* assumed to pay to the plaintiff a hundred guineas, assumed to pay to the plaintiff, *&c.* Upon *non assumpsit* pleaded, verdict for the plaintiff. And now Mr. *Gilbert* moved in arrest of judgment, that the consideration of this promise was not good, since it did not appear, that

The delivery of a note by which a stranger promises to pay the deliverer money, is a good consideration for a promise.

And in an action thereon, the plaintiff's note was made.

need not prove upon what consideration the

Hurst

MEREDITH
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CHUTE.

Hurst gave this note to the plaintiff upon any good consideration, and consequently the said note would be void, and then the delivery of the said note by the plaintiff to the defendant would be no prejudice to the plaintiff nor advantage to the defendant. But it was resolved (*per totam curiam*) that this was a good consideration; for though no consideration was expressed in *Hurst's* note, yet the note being subscribed by *Hurst*, was good evidence of a debt due from *Hurst* to the plaintiff; and therefore the delivery of the evidence of his debt to the defendant at his request was a good consideration of the *assumpsit* of the defendant, upon which this action was brought. And judgment was given for the plaintiff. Note, *Holt* chief justice said, that he was of opinion upon the trial, that it was not necessary for the plaintiff to prove, upon what consideration the note of *Hurst* was given, the defendant having admitted it to have been given upon good consideration by his promise.

Intr. Pasch.
12 Will. 3.
B. R. Rot. 97.
No instrument
which is not de-
livered, can be
a deed. R. acc.
post 967. acc.
2 Bl. Com. 306.

Therefore an
instrument
which a sta-
tute directs to
be signed and
sealed will not
be a deed, unless
the act directs
it to be deliver-
ed also. R. acc.
post 967.

No instrument
need be pleaded
with a profert,
which is inferior
in nature to a
deed. S. C.
Com. 112. R.
acc. post 967.
D. acc. 3 Lev.
205. acc. 1
Will. 122.

The omission of
a profert when necessary is a defect in form only. Qu? R. acc. 1 Sid. 308. and vide 4 Ann. c.
26. s. 1. If a statute authorises a certain proportion of a man's creditors to make a composi-
tion with him, and declares that such composition being made for the equal benefit of all his
creditors shall bind all, a composition to take a certain sum in the pound for the debts due to
such of the creditors as should sign it, is a composition within the statute for the benefit of all the
creditors, and all of them will be intitled to it. Qu? S. C. Com. 112. If a statute be made in
favour of persons who being unable to pay their debts should abscond, 'tis sufficient for a man
who would insist upon it to shew that he was unable to pay his debts and absconded; he need
not add that he absconded on account of his debts. Vide post 810. The words "ita quod"
when applied to a thing to be done, make it a condition precedent. S. C. 7 Mod. 10. 3 Salk.
59. If a statute directs that a composition by some of a man's creditors shall bind all, such
composition must be absolute and not conditional. S. C. 7 Mod. 10. 3 Salk. 59. And obliga-
tory upon the debtor. S. C. 7 Mod. 10. 3 Salk. 59.

Feltham vers. Cudworth.

THE plaintiff sued a *scire facias* upon a judgment of
817l. 13s. recovered by him as executor to *Thomas
Feltham* in an action of debt brought by him against the de-
fendant. The defendant at the day of the return of the se-
cond *scire facias* (which as well as the first *scire facias* was re-
turned *nihil*, &c.) solemniter exactus venit et dicit quod ipse non
potest dedicere quin praedictus the plaintiff executionem de debito,
&c. praedictis versus eum super terras et tementa bona et catalla
ipsius the defendant levandis habere debeat, Sed idem the defend-
ant ulterius dicit quod the plaintiff executionem de debito, &c.
praedictis super personam of the defendant habere non debet quia
dicit quod per a certain act of parliament made 8 W. 3. inter alia
it was enacted quod liceret et licitum foret ad et pro duabus tertiis
partibus vel pluribus in numero et valore omnium realium creditorum
eorum executoribus administratoribus guardianis et fiduciariis et
aliis personis authorizatis per eos aut aliquem eorum facere tale
agreementum seu compositiones qualia putarent apta vel rationabilia
cum aliquibus debitorum suorum qui existentes inhabiles ad sol-
vendum tota debita sua seipsos subtraxerant vel absconderant ab
eorum usualibus locis commorantiae sive fuerant vel devenerant
prisonarii pro debito ante decimum septimum Novembris 1696, et
quod quodlibet tale agreementum vel compositio facta pro aequali

beneficio omnium creditorum in proportionem ad respectiva debita sua et subscripta et sigillata per praedictas duas tertias partes vel plures in valore absque aliquo secreto fraudulento sive collateralis agreeamento pro aliquo majori advantage quam in eodem expressum foret obligaret et concluderet omnes alios creditores executores administratores guardianos et fiduciarios suos et omnes personas autorizadas vel clamantes sub ipsis vel aliquo eorum tam plenaria et effective ad omnia intentiones et proposita quasi omnes et quilibet eorum actualiter facerent subscriberent et sigillarent faceret subscriberet et sigillaret talia agreeamenta sive compositiones; then he shews also the rest of the act, which indemnifies executors, trustees, &c. for what they should do in pursuance of the said act; and the proviso, that such agreements should not defeat judgments, &c. so as they should not affect the persons of such creditors, &c. prout per eundem actum inter alia plenius liquet et apparet: Then the defendant further saith, that he at and before the seventeenth of November 1696, was indebted to the several persons hereafter mentioned in the several real debts hereafter specified, viz. (and then he particularises his creditors and his debts) in toto se attingentibus ad 35,686 l. 4 s. et 10 d. et non ultra, and that he separalibus temporibus praedictis vel aliquo tempore inde non fuit indebitatus alicui alii personae sive personis quibuscunque in aliqua denariorum summa quacunque, quodque ipse atunc non fuit indebitatus praedictis personis superius nominatis seu eorum alicui in aliqua majori vel alia denariorum summa quam ut superius mentionatum existit, quodque ipse idem the defendant praedictis separalibus temporibus ibidem inhabilis fuit ad solvendum debita sua praedicta et sic inhabilis existens ipse idem the defendant ante praedictum decimum septimum diem Novembris 1696 apud Westmonasterium praedictum in comitatu praedicto seipsum substraxit et abscondidit ab usuali loco ejus commorationis, eodemque the defendant sic abscondente substracto indebitato et inhabili ad solvendum debita praedicta existente, duas tertias partes in numero et valore omnium realium creditorum ipsius the defendant praedictorum, viz. (and then he particularizes their names) octavo die Januarii 9. Will. 3. apud Westmonasterium praedictum in comitatu praedicto per quoddam scriptum per eos respective subscriptum et sigillatum gerens datum eisdem die et anno quoddam agreeamentum et compositionem cum eodem the defendant de praedictis debitis per eundem the defendant ut praefertur debitos fecerunt in forma sequenti, viz. they severally covenanted and agreed with the defendant, quod ipsi acceptarent recipere et coperent of the defendant duos denarios pro qualibet libra quam ipse the defendant debuit separalibus creditoribus qui scriptum illud subscripserint in plena exoneratione et satisfactione separalium debitorum et summarum monetarum quas ipse the defendant debuit ipsis separalibus creditoribus, ita quod duas tertias partes in numero et valore omnium realium creditorum praefati the defendant, &c. sigillarent et subscriberent scriptam praedictam; et ita quod duo denarii solvendi pro qualibet libri quam ipse the

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If one of the conditions of an agreement be that one of the parties shall do a particular act within a limited time after he should be discharged from his imprisonment, it is not to be presumed from thence that he was in prison when the agreement was made. S. C. with some difference. 7 Mod. 10. 3 Salk. 59.

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the defendant debuit ipsis prædictis creditoribus qui scriptum illud subscripserint in manus suas soluti essent prædictis separalibus creditoribus vel eorum separalibus executoribus administratoribus vel assignatis infra terminum sive spatium quinque annorum proxime post tale tempus quale duas tertias partes in numero et valore omnium realium creditorum prædicti the defendant, &c. subscriberent scriptum prædictum et proxime post tale tempus quale ipse the defendant esset actualiter exoneratus de suo imprisonment per unum iudicium modo et forma prout in actu prædicto et in scripto prædicto mentionatum est, prout per scriptum illud plenius liquet et apparet: then he avers, that this composition was made for the equal benefit of all his creditors in proportion to their debts without any fraud, &c. and that the plaintiff had notice thereof the day and place aforesaid, and was requested to sign it, but that he refused, &c. et hoc paratus est verificare, unde petit iudicium si the plaintiff executionem suam prædictam versus personam of the defendant habere debeat, &c. The plaintiff demurred generally, and the defendant joined in demurrer.

And this case was argued several times at the bar by Mr. Dee, Mr. Broderick, and Mr. Robert Eyre, for the plaintiff; and by Sir Bartholomew Shower, Mr. Cowper, Mr. Raymond, and Mr. Mountague, for the defendant. And the first exception that was taken by the plaintiff's counsel to this plea was, that the defendant has pleaded this composition to have been made per quoddam scriptum of the creditors subscribed and sealed by them, which is in judgment of law a deed, as when one declares upon a bond, one says that the defendant per scriptum obligatorium sigillo suo sigillatum, &c. and then the defendant should have pleaded it with a *profert in curia*; for all deeds made to the defendant himself, and pleaded by him, ought to be pleaded with a *profert in curia*; and therefore in this case for want of pleading this deed of composition with a *profert in curia* the plea is ill.

Against which it was argued by the counsel for the defendant, that admitting, that this composition ought to have been pleaded with a *profert in curia*; yet that such omission was only matter of form, of which the plaintiff could not take advantage upon a general demurrer. *Cro. Eliz.* 217. *Vauny v. Aplen.* But the court did not give any opinion upon that. But see 10 *Co.* 94. b. *Dr. Lyfield's case.* *Cro. Ja.* 32. *Dowbeney v. Bannister* 292. *Purfrey v. Grime* 360. *Rolls v. Boulting and Roberts*, that the want of pleading a deed with a *profert in curia*, where it ought to be, is matter of substance. Then it was further argued by the defendant's counsel, that this composition was not a deed, nor is it requisite that it should be by deed; for the act of parliament says, that they by writing signed and sealed, &c. which

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which does not describe a deed, for delivery is essentially requisite to the making of a deed: and then it not being a deed, there is no need to plead it with a *profert in curia*, no more than an award. And as to the case cited of the declaration upon a bond, that there it is only said, *per scriptum obligatorium sigillo sigillatum*, and yet that is looked upon as a deed, and always pleaded with a *profert in curia*; it was answered, that it is partly by the course of the court, that such declaration is held good to describe a bond, without shewing the delivery, and partly by reason of the word *obligatorium*; but that an appointment in an act of parliament, will, power, &c. to do a thing by writing sealed, shall never be construed by law, to be an appointment to do it by deed, for want of an appointment that it shall be delivered, the delivery being of the essence of a deed. And therefore they concluded the plea good notwithstanding this exception. And of this opinion was the whole court for the reason last mentioned, and over-ruled the exception.

2. A second exception taken by the plaintiff's counsel was, that the act, as it is pleaded, is that every composition made for the equal benefit of all the creditors in proportion to their respective debts, and subscribed and signed by two third parts in number and value, shall bind, &c. then this composition pleaded in the defendant's plea does not appear to be made for the equal benefit of all the creditors; for it is pleaded to have been made by two thirds in number and value, and that they agreed to accept two pence for every pound due to themselves; so that it was made for their benefit only, and not for the benefit of the other creditors; and consequently the composition is not such as will oblige the other creditors by the act of parliament.

To which it was answered by the defendant's counsel, that this composition was for the equal benefit of the two third parts, &c. and made by them, and then their act will oblige the rest, and they also might have taken advantage of the composition, and might have demanded the two pence for every pound of their debts, as well as the subscribers, and so in effect and by the law it is a composition for the equal benefit of all the creditors. Besides, that the defendant has averred expressly, that this was a composition for the equal benefit of all the creditors, which the plaintiff has not denied, but has admitted by his demurrer. And *Hol* chief justice seemed to be strongly of opinion, that this composition was for the equal benefit of all the creditors; but to that he did not give a positive opinion.

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3. A third exception taken by the plaintiff's counsel was that this act extended only to persons who were imprisoned, or absconded for debt before the seventeenth of November, &c. but the defendant has not shewn that he absconded for debt; for he has said only, after shewing of his debts, that he was unable to pay his debts, *et sic inhabilis existens* he absconded, &c. *et sic abscondente indebitato et inhabili ad solvendum debita sua prædicta existente*, two thirds, &c. Now it may be, that though he was unable to pay his debts, yet he did not abscond for the said reason, but for the commission of some crime, as treason, &c. and then he will not be within the intent or benefit of the said act. And Mr. Robert Eyre cited a case some years ago, where such a plea was adjudged ill for this exception. And of that opinion the court seemed strongly to be; but afterwards upon reading of the act, and urging, that this plea was pleaded in the very words of the act, and that the defendant had no need but to pursue the words of the act of parliament, the court seemed to change their opinion; but they did not determine this point.

4. The fourth exception taken by the plaintiff's counsel, and upon which they principally relied, was that this composition pleaded by the defendant was not any composition at all within the meaning of the act, because it does not appear, that the defendant would be at any time obliged to perform it, viz. by payment of the two pence in the pound, &c. forasmuch as the composition is, that the two pence should be paid within five years after two thirds part of the creditors had subscribed, and the defendant was discharged out of prison according to the form prescribed by the act; and it does not appear in all the plea, that the defendant was in prison: and perhaps the defendant was not in prison, and then he cannot be discharged out of it, and consequently the two pence will never be payable. Besides which, they urged, that the payment of the two pence was a condition precedent to the composition, so that before the performance of it the composition was not to arise; then it not appearing, that this condition precedent was possible to be performed, the composition can never take effect.

To which it was answered by the defendant's counsel. 1. That the words of the act were general, of any composition, and therefore that two thirds of the creditors in number and value had authority, to make any agreement or composition whatsoever; be it conditional, or with limitation, or be it to take effect immediately or forty years hence. And Sir Bartholomew Shower urged, that if they released their whole debts, &c. that would bind the other third of the creditors. That in this case this was a composition, and subscribed and signed by two thirds of the creditors,

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creditors, &c. and therefore that it would bind the plaintiff; and he will have his remedy for the money due to him, when it becomes due: or if it never becomes due, it will be the same thing; because he will be in as good a condition as the other subscribing creditors, to whom the act has given power to bind all the creditors. 2. They urged, that this *ita quod* could not be a condition precedent, but if it were a condition, it would be subsequent; and then if it were impossible to be performed, the composition would be absolute. But if it was possible to be performed, and was not performed, that ought to be shewn on the part of the plaintiff. And for this purpose 7 Co. 9. *Ughtred's case*. Cro. Eliz. 219. 1 Leon. 229. *Jennings v. Gower*. Winch. 103. *Cooper v. Edgar*. W. Jones 389. 1 Roll. Abr. 415. pl. 12. *Spring v. Caesar*. 3 Lev. 132. *Edwards v. Hammond*. 3. They urged, that if this *ita quod* were adjudged to make a condition precedent, yet the performance of it is not necessary to be shewn in this case, because the defendant has five years to perform it after his discharge out of prison; *a multo fortiori* he has five years from the making of the composition; but here it appears, that five years are not yet elapsed since the composition made; for the composition was made the eighth of January 1697, and therefore at this time there is no need to shew it performed, since by the agreement, which appears to the court, he has a longer time to perform it. 4. They urged, that this bar was good to a common intent; and therefore if the defendant was not in prison, that ought to be shewn on the part of the plaintiff. And for that Cro. Car. 6, 195. 2 Bulstr. 205. *Savill*. 111. 1 Saund. 298. were cited: that the true notion of a common intendment is as much as to say, that something in strictness is omitted, which the court will supply by their intendment; which if the court will do here (admitting that the defendant ought to have shewn that he was in prison) the plea will be good, and the composition performable. *Sed non allocatur*. For (*per totam curiam*) this is no composition within the act; because it may happen, that the defendant shall never be obliged to perform it. For the agreement is to pay two pence in the pound, *ita quod* it be paid within five years next after, &c. which makes this circumstance of time, when the money shall be paid, a condition precedent to the composition; so that if that be never performed, there will be no composition. An agreement and composition within the act must be intended a final agreement, such as the defendant shall be bound to, and from which he cannot vary. Therefore until the money be paid in this case, this here will not be a composition; for if the money be not paid within the five years, the defendant will be at large from his agreement, and not obliged to pay the two-pence at all. And Holt chief justice (who pronounced the opinion

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of the court) said, that altho' *ita quod* is held in *Littleton*, to make a condition subsequent; yet that is in case of estates executed, but it is otherwise in case of things executory. As if *A.* shall covenant, to convey his lands to *B.* *ita quod* 10*l.* be paid to *A.* before *Michaelmas*; the payment of the money is a condition precedent to the conveyance of the lands; and he is not obliged to perform his agreement, unless the 10*l.* be paid at the time appointed. In this case the act intended, that it should be a complete agreement, and that it should not depend upon any contingency; but in this case the composition is still worse, for this here is a condition precedent impossible; for it does not appear, that the defendant was in prison, &c. and the court cannot intend it, for there is nothing in the plea, that can lead us to such intendment. Now if a condition precedent be impossible; the estate, interest, or agreement, cannot rise: but a condition subsequent is of another consideration; for if the agreement had been, that the two pence should be paid within the five years; that had been only in nature of a defeasance of the agreement, and well enough. But it is otherwise now, this being a condition precedent impossible. And for this reason judgment was given for the plaintiff.

Wright *vers.* Crump.

S. C. Salk. 201. 7 Mod. 1.

The king's bench will grant an attachment against the judge of an inferior court for misconduct.

'Tis misconduct to sit as judge in a cause in which he is party.

Vide 12 Mod. 687, 688.

A Motion was made for an attachment against *Rolfe* an attorney, steward of a court in *Norfolk*, for having misdemeaned himself in a trial before him between these parties. And *Holt* chief justice upon this motion cited a case, to have been adjudged in *B. R.* when *Hyde* was chief justice, cited *Salk.* 396. which was thus. The mayor of *Hereford* claimed a title to a house in *Hereford*, and in order to recover it he made a lease of it to *J. S.* to the end that he should sue an ejectment, which *J. S.* did accordingly in the mayor's court in *Hereford*, and so the mayor in effect was judge in his own cause, and he gave judgment for his lessee, and execution was sued there by him; and upon complaint of this matter in *B. R.* the court here granted an attachment, and committed the mayor for these proceedings.

Odes *vers.* Dr. Woodward.

S. C. Salk. 87. 3. Salk. 116. Holt 401.

A warrant of attorney to confess a judgment cannot be revoked. S. C. 7 Mod. 93.

At least it is not actually revoked by the death of the party who gave it. S. C. 7 Mod. 93. R. acc. Str. 882. 3 P. Wms. 398. *Seville v. Wiltshire.* 2 Barnes 212. Str. 108. cont. 2 Vent. 310. and vide Str. 718. 1081. A judgment may be signed after the death of the party against whom it is signed, if it can be looked upon as a judgment of a time when he was alive. S. C. 7 Mod. 93. R. acc. Str. 1081. 2 Barnes 212. and vide 17 Car. 2. c. 8. ante 244. A judgment signed in vacation is looked upon as a judgment of the preceding term. S. C. 7 Mod. 2. 93. R. acc. 2 Barnes 212. *Northern v. Oliver.* 2 Barnes 205. *Fawkes v. Atkinson.* 2 Barnes 209. A judgment ought to be carried in before the effoign day of the term succeeding that in which the judgment was given. If it is not, the court may prevent the party from carrying it in afterwards.

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gave the plaintiff a warrant of attorney, to enter a judgment against him for ——— last *Hilary* term; that the plaintiff did not proceed upon it in the term; that after the end of the term *Dr. Woodward* died; and that after his death the plaintiff entred this judgment against him, which was erroneous. But *Holt* chief justice said, that the entry will be as of the last term, and so before the defendant's death, and consequently not erroneous; and that such entry was not irregular, but agreeable to the constant practice of the court. But upon the serjeant's importunity they granted a reference, &c. but refused to stay the proceedings. And they told the serjeant, that if that was all the irregularity, he would get nothing by his reference. *Post. 849.*

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Lumley *vers.* Quaree.

S. C. But no judgment. 7 Mod. 9. differently reported Salk. 101. Holt 88.

THE plaintiff brought an action of trover against the defendant in the *Poultry* compter in *London* for goods of a great value. The defendant removed the cause by *habeas corpus* into the king's bench, and he moved there, to be discharged upon common bail; because he seized these goods as judge of the admiralty in *Pennsylvania*, they being condemned there by sentence; and the said sentence affirmed here upon appeal by *Sir Charles Hedges*. The plaintiff made affidavit of the value of the goods to be 1000*l.* And *per Holt* chief justice the practice is, that if the plaintiff does not shew his cause of action upon summons, the defendant shall be discharged upon common bail, notwithstanding that the cause is removed from an inferior court. Now here the defendant, having acted as judge, is (a) not liable to an action. But bail was ordered to be put in for 500*l.* because if the defendant acted as a judge, he will be out of danger of any action; but if he did not act as a judge, then it is very reasonable that special bail should be put in.

Defendant shall not be excused from giving special bail, upon a suggestion that the action is brought for something done by him in a judicial capacity.

(a) Vide ante 454. and the cases there cited.

Regina *vers.* Taylor.

AN indictment was found at the sessions of the peace of the corporation of *Walls* in *Somersetshire* against the defendant, for having used a trade, not having served as an apprentice for seven years. And being moved into the king's bench by *certiorari*, it was quashed, because the justices at such sessions have not jurisdiction to take such indictments, for the statute doth not give them jurisdiction, and justices of peace have no jurisdiction but by some statute.

An indictment upon 5 Ellis. c. 4. for exercising a trade without having served an apprenticeship cannot be preferred at the sessions of a borough.

R. cent. post 1038. and vide 5 Ellis. c. 4. l. 1.

Regina *vers.* Ford & al'.

Where a statute imposes a pecuniary penalty upon conviction by a justice for an offence, and directs that it shall be levied by a warrant from such justice, if the conviction is removed into B. R. by certiorari, and there confirmed, a *levari facias* may be sued out of B. R. for the penalty.

Execution cannot be upon a judgment sued out by one who was not party to it.

Attorney general and Solicitor general.

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Judges for life determined by the demise of the king
See 1 Ric. 3. 4.
Audeif pl 113.
Dier 165. a.
7 Co. 30. a.
Moore pl. 311.
12 Co. 49.
2 Inst. 175.
Cro. Car. 1. 2.
Bro. Pat. 89.
Fitzh. grant. 31.
4 Edw. 4. 44.

FORD and the other defendants were convicted of deer-stealing by justices of peace according to the late act of parliament, 3 W. & M. c. 10. And the convictions, being removed into the king's bench by *certiorari*, were there confirmed. And after the confirmation, and before execution awarded, the person, who was as well the informer as the owner of the deer, died; and his wife, being his administratrix, suggested his death upon the roll, and that she was administratrix, and upon that sued a *levari facias* upon the said convictions confirmed as aforesaid, to levy the penalties; which were levied accordingly by the sheriff, and distributed as the statute directs. And now Mr. King moved, that this execution should be set aside as irregularly obtained. 1. Because a *levari facias* does not lie. 2. Because the execution ought not to have been sued by the administratrix without a *seire facias*, &c. But as to the first objection, the whole court held, that a *levari facias* well lay. But they held, that this execution was irregular; because in no case where the parties to the judgment are changed ought execution to be sued by any other without a *seire facias*. Whereupon restitution was granted of the money levied.

Memorandum, That the first day of June 1702. Edward Northey esquire, attorney general to the late king, and Simon Harcourt of the Inner Temple esquire, received commissions to be attorney general and solicitor general to the queen, and were sworn the same day before the lord keeper of the great seal, and afterwards were knighted by the queen. Sir John Hawles, late solicitor general to the deceased king, received notice of his removal some days before.

Memorandum, That Thursday the fourth of June, 1702. Sir John Turton knight, justice of the king's bench, and Sir Henry Hatsell knight, baron of the exchequer, received letters from the lord keeper of the great seal, that it was the queen's pleasure, to supersede their commissions, and to acquaint them, that they would receive their supersedeas within two or three days after; and therefore he referred it to their discretion, whether they would come to Westminster-hall for so short a time. And upon receipt of the said letters they did not come to the hall. And afterwards on Tuesday the ninth of June they received their supersedeas's. And so they determined a question against their interest, viz. that a patent to be judge quamdiu se bene gesserint, &c. determined by the demise of the king, of which many doubted.

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Memorandum, That in this Trinity term the queen gave directions for renewal of the judges patents, and for supply of the vacancies, and accordingly they all received new patents, excepting Holt chief justice de B. R. who had received his writ as aforesaid. And Mr. Price and Mr. serjeant Smith were made judges instead of Sir John Turton and Sir Henry Hatsell late'y removed. And Mr. Robert Price not being a serjeant, Sir Thomas Powys and he received writs to be serjeants. And accordingly Tuesday the twenty-third of June they appeared in chancery, and took the oaths of the serjeants; and afterwards they were coised in the treasury of the common pleas; and being robed in their party-coloured robes, were brought to the bar of the common pleas, and counted; and gave rings, of which the inscription was, Regina et lege gaudet Britannia; and afterwards they made a treat in Lincolns-inn hall, where the greatest part of the judges, &c. were present, and some of the nobility. Note, That at first was ingraued Deo et Reginæ in the motto of the rings; which not being approved of by the lord keeper of the great seal, he gave direction, that it should be altered, which was done accordingly. The next day, being the feast of St. John Baptist, the judges were sworn in the morning (except Mr. Baron Price, who was not sworn till night, to the end to have preserved the seniority for Mr. serjeant Smith then about his return from Ireland) at the house of the lord keeper of the great seal, viz. Sir John Powell (formerly a justice of the common pleas) Sir Littleton Powys and Sir Henry Gould justices of the queen's bench; Sir Thomas Trevor chief justice, Sir Edward Nevill, Sir John Blencowe, and Robert Tracy esquire (formerly a baron of the exchequer) justices of the common pleas; and Sir Edward Ward, Sir Thomas Bury, Robert Price esquire, barons of the exchequer. Serjeant Smith was not sworn then, not being returned from Ireland, but he was sworn before the circuit.

Judges made.

Sir Thomas
 Powys and Ba-
 ron Price made
 serjeants.

Memorandum, That the same twenty-fourth of June Sir Thomas Powys knight, serjeant at law, and Mr. serjeant Birch, were sworn senior queen's serjeants, by which they have precedence of the attorney and solicitor general. And at the same time Mr. recorder Lovell, Sir John Darnall knight, Sir Joseph Jekyll knight, and serjeant Hooper, were sworn queen's serjeant, having received their patents before.

Memorandum, That the same twenty-fourth of June Sir William Whichcote knight, John Conyers esquire, and William Cowper esquire, were sworn queen's counsel, having received their patents before.

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Note, That by these alterations serjeant Bond, serjeant Wogan, serjeant Philips, serjeant Hutchins, and serjeant Whitacre, serjeants to the deceased king, were left out from being queen's serjeants; and Sir Nathaniel Powell, Aglionby esquire, and William Clerk esquire, were left out from being queen's counsel, they having all been counsel to the deceased king.

Serjeant Hook was removed from being a Welsh judge, and Mr. Peasley succeeded him as chief; and Marmaduke Gwynne esquire succeeded Mr. Peasley. And Charles Cox esquire succeeded Mr. baron Price in his place of Welsh judge. The other Welsh judges had their commissions renewed, except Francis Floyd esquire, who was afterwards removed, and succeeded by Thomas Webb esquire.

Note, That Sir Joseph Jekyll, chief justice of Chester, insisted that his office was not determined, being usually granted for life, and therefore he continued the exercise of it without a new patent.

Trinity Term

I Annæ reginæ, B. R. 1702.

Poitvin *vers.* Tregeagle.

THE plaintiff sued a *latitat* against the defendant returnable in *Hilary* term 13 *Will.* 3. and in the same term he declared upon it against the defendant, and also in the same term he delivered a declaration by the by in *assumpsit* upon several promises; to which last declaration the defendant pleaded *non assumpsit*. And issue being joined, notice was given for trial. After which the plaintiff seeing, that his *Christian* name was mistaken, *viz.* *John*, where it should be *Peter*; *Wednesday* the tenth of *June*, all being in paper, Mr. *Raymond* moved for leave to amend the declaration, which was granted upon payment of costs. But afterwards when the attorney came before Mr. *Clerk*, to have the costs taxed, he refused to do it, because in this case the plaintiff could not have leave to amend, this being only a declaration by the by. Upon which Mr. *Raymond* moved the court for their direction to the master to tax the costs *Monday* the fifteenth of *June*. And he urged, that such amendment might well be granted, tho' it was a declaration by the by; for since the delivery of the declaration was regular in this manner, it would be a declaration to all purposes, and therefore would partake of all advantages that other declarations enjoyed; that it was in effect founded upon the *latitat* in the other action, and therefore in this matter of the name of the plaintiff might well be amended by it; that it would be no prejudice to the defendant, because if he nonsuited *John Poitvin*, yet he could not levy the costs upon *Peter Poitvin*. But nevertheless *Powys* and *Gould* justices, being only in court, held that such amendment could not be granted, because there is no writ by which the declaration can be amended; and therefore they refused to give any direction in it.

The christian name of the plaintiff cannot be amended in a declaration in B. R. by the by.

The reason is plain, for if the plaintiff's name is mistaken, it is no declaration at his suit, and if *Peter* will declare by the by in the name of *John* it is not *Peter's* suit, so he has no right to move to amend. Note to 3d. Edit.

Intr. Mich. 13
Will. 3. B. R.
Rot. 316.

Green vers. Rivet.

S. C. But rather differently reported Salk. 421. 7 Mod. 12.

In pleading a bill of *Middlesex* it must not be represented to have been sued out and made returnable on the same day.

A replication stating a bill of *Middlesex* to have been sued out within the time prescribed by the statute of limitation, will be no answer to a plea under the statute, if it represents the bill to have been made returnable on the day it was sued out. Vide 11 Mod. 120. Bl. 1133.

(a) Vide I. B. R. 102.

Indebitatus assumpsit for goods sold. The defendant pleaded the statute of limitations. The plaintiff replied, that he at *Westminster in comitatu Middlesex die Lunæ proxime post tres septimanas Paschæ* prosecuted suit a bill of *Middlesex* for the same cause of action returnable in *B. R. apud Westmonasterium prædicto die Lunæ proxime post tres septimanas Paschæ*, &c. which was within the six years. The defendant rejoined matter impertinent and idle, upon which the plaintiff demurred. And exception was taken the last term by Mr. *Cheshyre* for the defendant, that the replication was ill, inasmuch as the bill of *Middlesex* did not appear to be good. For, 1. It is pleaded to be sued *Monday proxime post tres Paschæ*, returnable *apud Westmonasterium prædict. die Lunæ*, &c. Now in point of grammar *prædict.* must be referred to *Westmonasterium*, and then the *Monday proxime post*, &c. the day of the return must be regarded as the *Monday proxime post tres Paschæ* next after the writ sued, which will be twelve months after; and so the bill of *Middlesex*, being a process to arrest the body of the defendant, and having so long a return, is perfectly void. And for that he cited *Tr. 15 Edw. 3. 5. 18 Edw. 4. 4. 12. 13. Dalison 104. Dier 175. Cro. Eliz. 467. Dier 118. 2. If prædict.* shall be taken to refer to *die Lunæ*, and so the suing out and the return the same day, it will be a bad bill of *Middlesex*; because such bills of *Middlesex* are not warranted by the course of the court, but they ought to be returnable immediate, or *de die in diem*. So that both ways the bill is void, and will not prevent the operation of the statute of limitations. Against which it was urged by Mr. serjeant *Hall* for the plaintiff, that the *prædict.* may well be referred to *die Lunæ*, and then it will be well enough, because the prosecution and the return may be the same day. As in *Wales*, they are not confined to fifteen days between the *teste* and return, but process may be returnable the next day. *Cro. Car. 179. Griffith v. Jenkins, 1 Sound. 74.* That bills of *Middlesex* are founded upon the course and custom of this court, and therefore not confined so strictly to the rules that govern other writs; as bills (a) of *Middlesex* have not any *teste*. 2 *Sid. 129.* And therefore he concluded, that this bill of *Middlesex* should be taken to be returnable the same day, and well enough. But the whole court held it ill, and therefore gave judgment for the defendant, *nisi*, &c. before the end of *Easter* term. And afterwards Mr. *Raymond* attempted to shew cause, &c. *absente Holt* chief justice, and obtained an enlargement of

of the rule until the first day of this term. At which day he urged, that the *prædict.* should be referred to the *die Lunæ*, and not *Westmonasterium*, because one never makes use of the word *prædict.* when one mentions *Westminster* upon the record; and therefore in the entry of the continuances one does not say *apud Westmonasterium prædictum*, but *Westmonasterium* generally; also that it is no objection, to say that it cannot be referred to the *die*, &c. because it goes before it; for it is more elegant *Latin*, to insert the adjective before the substantive, than after it. Besides, that it would be hard, when it was in the power of the court to make a construction that would preserve a debt, to make such construction as would destroy it. And for these reasons the court seemed to incline to refer *prædict.* to *die*. Then he urged, that a bill of *Middlesex* might be returnable the same day that it was sued out, as process in many courts are. *Habeas corpus* in this court returnable *immediate*, &c. But Holt chief justice said, the process was returnable *de die in diem* in this court; that a bill of *Middlesex* could not be returnable the same day that it was sued; that in this case the fault was, in not having pleaded this bill to have been prosecuted as before, &c. And therefore he was clear, that the defendant ought to have judgment. To which the other judges agreed, and they disallowed the cause, &c.

Lapiere vers. Ducem St. Albans.

THE plaintiff brought an action of debt against the defendant upon a single *English* bill, viz. I do promise to pay to Francis Lapiere or order the sum of 40 l. the first of *October* next, witness my hand and seal; which bill was signed, sealed and delivered by the defendant, dated the fifteenth of *March* 1693. The defendant permitted judgment to pass against him by default. And the master of the office at the plaintiff's request declared, that he would give interest for this money in the damages. Upon which the defendant by Mr. How made application to the court to have their rule, to hinder the master of the office from doing so. And he urged, that interest ought not to be given at all; because the bill being single, the debt was certain, and where the debt is certain, the party ought not to have interest; for that would be in some manner against his own agreement, which was to content himself with the sum contained in the bill. Besides, that in debt for rent they never give interest, no more here, &c. But against this it was urged by Mr. Raymond, that it was the constant practice in all the courts of *Westminster-hall*, upon judgments in debt upon default or confession, to tax the damages

occasions

In the Exchequer, Friday June 19.

In debt upon a single bill the plaintiff shall recover interest.

Vide Salk. 623. Str. 649. Bl. 761. 2 T. R. 58. 2 Ver. 365. 1 Bro. S. C. 219.

Tho' the action is brought against the personal representative of the obligor.

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occasione detentionis debiti. Then the non-payment of interest, when the debt carries interest (as all *English* bills do) is a damage to the plaintiff. But as to the case of rent, it does not carry interest, and therefore in such case no interest shall be given. And he cited 2 *Saund.* 106. *Holdip v. Otway*, as a much stronger case, where in debt upon a bill obligatory brought against an executor upon a bill of the testator judgment was given by default in the common pleas, and the interest of that bill was taxed in the damages; and yet in such case the judgment is, that the damages shall be levied *de bonis testatoris, si, &c. si non, tunc de bonis propriis* of the executor; and upon error brought in *B. R.* as to that matter, the said judgment was held good, but reversed for other error. And in this present case the whole court of exchequer were clear of opinion, that the interest ought to be taxed by the master of the office in the damages.

Note, that *Mich. 6 Will. & Mar. B. R.* 1694, between *Relleson and May*, (a) debt was brought upon a single bill dated seven and twenty years before, against the defendant as executor to his father, and judgment was given against him by default; and Mr. *Ashton* then secondary taxed damages and costs. And Sir *Bartholemew Shower* moved the court, that the interest should be included in the damages, upon the authority of the said case of *Holdip v. Otway*, 2 *Saund.* 106. But it was denied *per curiam*; because by such means, if the defendant had not *assets*, he would be compelled to pay this interest, being included in the damages (the entry being, as to the damages, *si non, tunc de bonis propriis*) out of his own estate, which would be very unreasonable.

(a) This case is reported in *Skinn.* 561, and *Comb.* 297, and in each of those reports the court is represented to have been of opinion that the plaintiff should have interest, but that he should not have judgment for what accrued in the life-time of the testator in default of assets out of the effects of the executor.

Burton *vers.* Souter.

A promissory note payable to a man or order is not a negotiable instrument within the custom of merchants. *R. acc.* ante 757, and see the cases there cited.

Upon a plea of tender, if the plaintiff takes the money out of court, he admits the tender. *R. acc. Cro.* *Jac.* 126. pl. 13. ante 639. *D. cont. J. B. R.* 3d. Edit. 192, and vide *Str.* 1047.

A *Sumpsit* upon several promises. One count was upon the custom of merchants, and declared upon a note subscribed by the defendant, payable to the plaintiff or order, &c. The defendant pleaded a tender, and brought the money into court. The plaintiff took the money out of court; and then to have damages, traversed the tender. And issue being joined upon it, a verdict was found for the plaintiff, and a penny damage given. Upon which Mr. *Broderick* moved in arrest of judgment, 1. That such note is not within the custom of merchants, but they ought to declare upon a *mutuatus*, and give the note in evidence; as it was settled last term between *Clerk* and *Martin*. [See the said case before, 757.] And of that opinion was the whole court. 2. That the plaintiff could not proceed for damages, after he had accepted the money brought into court. And of the said opinion was *Holt* chief justice strongly, as he had been before,

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before, in the case of *Horne v. Lewin*. [See the said case before, 639.] But because the *postea* was not in court, it was only staid until, &c. And afterwards it was staid absolutely; Mr. King counsel for the plaintiff declaring, that he could not maintain it.

Shirley *vers.* Wright.

3. C. Salk. 700. Holt. 761. Incorrectly reported Salk. 273. 7 Mod. 29.

THE plaintiff brought an action of debt against the defendant for the escape of J. S. being in his custody as sheriff of the county of Chester, by virtue of a *capias ad satisfaciendum* issuing out of the court of — upon a judgment recovered there by the plaintiff against the said J. S. And upon not guilty pleaded, a verdict was given for the plaintiff at Guildhall in London the last term. Upon which the last day of the last term Mr. Ward moved in arrest of judgment, that it appeared upon the declaration, that the *capias ad satisfaciendum* bore *teste* in Michaelmas term, and was returnable *termino Paschæ* next following; so that all Hilary term intervened, and was left out; and that for this reason the said *capias ad satisfaciendum* was altogether void; and then of consequence it was no escape in the defendant, though he permitted J. S. to go at large. And to prove, that if there is an intervening term between the *teste* and return of a *capias*, the writ is void, he cited *Fitz. Continuance* 3. because the defendant ought not to stay so long in prison. *Hil. 21 Hen. 7. 16. pl. 27. Dyer 175. Cro. Eliz. 466. Neilor and Sharpe v. Gennet* in point; where it is held, that a man taken upon a *capias utlagatum* returnable five years after the *teste* was not lawfully a prisoner; and that it was no escape in the keeper of Newgate, though he permitted him to go at large. Upon which the court made a rule, that the judgment should be stayed until, &c. And now this term Mr. common serjeant Dee, Mr. Broderick and Mr. Cheshyre, moved for judgment for the plaintiff. And they said, that all the books cited of the other side, which affirm, that a *capias*, that has a term intervening between the *teste* and return, is void, except *Cro. Eliz. 466.* must be understood of a *capias* in *mesne* process, and not of a *capias ad satisfaciendum*, which is apparent by the reason given by the said books, *viz.* that the defendant ought not to be detained so long in prison, without having an opportunity to make his defence. But the said reason does not hold in cases of writs of execution; for there the defendant ought to be kept in custody, until he pay the whole money recovered against him, and then upon payment thereof he shall be discharged, and not before. Then if the said reason fails in cases of *capias ad satisfaciendum*, the law will fail also. Wherefore they concluded, that a *capias ad satisfaciendum*

A *capias ad satisfaciendum* is not void, tho' a full term intervenes between it's *teste* and return.

No objection to process which does not make it void, will excuse an escape. *vide Cro. Jac. 289. 3 Co. 142. b.*

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dam with such a return was not void, but was only voidable at most. And then if it were only erroneous and voidable, the sheriff shall not take advantage of it; but it will be an escape in him, if he permits a man taken in execution upon such a writ to go at large. And to prove that, *Cro. Eliz.* 188. *Bushe's case*, 2 *Bulstr.* 256. *Keifar v. Tyrrel*, were cited, where it was held, that if the defendant is arrested upon a *capias ad satisfaciendum*, issuing upon a judgment without a *scire facias*, after the year, and the sheriff permits him to escape, an action lies against the sheriff, notwithstanding that the *capias ad satisfaciendum* issued erroneously. So in *Moor* 274, *Cro. Eliz.* 164. *Ognel v. Paston*, it was held, that if it should be admitted, that a *capias ad satisfaciendum* would not lie upon a judgment upon a *scire facias* upon a recognisance acknowledged in chancery; yet if the court awarded a *capias ad satisfaciendum*, and the sheriff arrested the defendant upon it, and permitted him to go at large, an action would lie against him for the escape. And several other cases were cited, to prove, that the sheriff shall not take advantage of error in process. 2 *Saund.* 100. *Cro. Eliz.* 271. *Richbell v. Goddard*, *Poph.* 205, a strong case, where a *capias* was returnable at the day of *All Souls*, which is not a *dies juridicus*, and the sheriff was forced to have the body in court. 21 *Edw.* 4. 23. *Dier* 67. and 21 *Edw.* 3. 31. *Fitzh. jour.* 9. were cited, that the justices at their discretion may give day. From whence it was concluded, that this writ was not void, and consequently that the defendant was guilty of an escape; and therefore that the plaintiff ought to have his judgment.

Mr. Mountague and Mr. Ward for the defendant argued to the same purpose as was done last term. And they relied principally upon the case in *Cro. Eliz.* 466. as a case in point, there being no difference as to this purpose between a *capias ad satisfaciendum* and a *capias utlagatum*. And Holt chief justice held, that the case of *Nector and Sharpe v. Gennet* was a case in point; but he said, he was not satisfied with the reason of the said case; for there is an apparent difference between writs of *mesne* process, and writs of execution; for in case of writs of *mesne* process if a term be omitted between the *teste* and return, the cause is altogether out of court. But that is to be understood in personal actions; for in real actions the law is otherwise, for in them there must be nine returns between the *teste* and return. But in case of a writ of execution the cause is come to its end. In cases of *mesne* process it would be hard to suffer so long a return, because the body must lie in prison, without having an opportunity to make a defence, when perhaps he is able to make a good defence. But the defendant ought to lie in execution, and the sheriff ought to have his body always ready to bring to the court, when he shall be commanded by

by *habeas corpus*, &c. And therefore all the judges, viz. *Holt* chief justice, *Powys* and *Gould* justices held, that this writ could never be void. And therefore they gave judgment for the plaintiff, *nisi*, &c.

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Regina *vers.* Rogers.

UPON a *certiorari* directed to the mayor and aldermen of *London*, to remove, &c. they return, that there is a custom in *London*, that if any citizen of *London* makes an assault upon, or speaks words defamatory of, an alderman of *London* being in the execution of his office, that the common serjeant of the city of *London* should exhibit an information against such person in his name in the court of the mayor and aldermen, and that proceedings might be against him there, in order to impose a fine upon him; that at a wardmote held before *Sir Robert Jefferyes* one of the aldermen of the city, the defendant *Rogers* made an assault upon *Sir Robert Jefferyes*, and spoke of him these defamatory words (the wardmote being held in a church) "If I am churchwarden next year, you shall ask my leave to keep your wardmote here:" upon which *Sir Robert Jefferyes* called him rogue and rascal; to which *Rogers* replied, "I have as much to do here as you; you think sure you are among your *Bridewell* birds, you are not among your *Bridewell* birds, you are mistaken:" and upon this the common serjeant exhibited an information against him, &c. [Note, *Sir Robert Jefferyes* was governor of *Bridewell*.]

A custom to disfranchise a corporator for speaking disrespectful words of one of the heads of the corporation, is void.

But a custom that a particular officer of the corporation shall prosecute in the corporation court any corporator who shall assault any of the heads of the corporation, is good. *S. C.* *Salk.* 425.

Several motions were made in this case by Mr. recorder *Lovell*, and by Mr. *Dee* common serjeant, for a *procedendo*. And they were opposed by Mr. *Broderick* and Mr. *Yates*, on behalf of the defendant. And it was agreed by the court, and counsel of both sides, that a custom to disfranchise for such words would be void. 2 *Lev.* 200. But Mr. *Dee* said, that notwithstanding the report of the case in *Levinz*, he had seen a rule for a *procedendo* in the said case. 2. It was resolved, that a custom to proceed in such manner for an assault of an alderman exercising his office was good, since it tended to preserve the good government of the city: that the proper proceeding for offences by the common law was by indictment, and yet they proceeded in this court by information against offenders; and for the same reason a custom to proceed in such manner in *London* will be good. Then the custom being returned, since it is not unreasonable, it ought to be allowed. And therefore upon this point of the assault only, without having any regard to the words, the court declared, that they would grant a *procedendo*. For as to the words, *Holt* chief justice said, that since no information or indictment will lie for these words

Tho' the party assaulted has a right to sit as one of the judges in the corporation court. *S. C.* *Salk.* 425. *Vide Salk.* 397. *Com. Justices I.* 3. 2d. Ed. vol. 4. p. 5.

Provided he is not actually bound to sit there. *S. C.* *Salk.* 425. *vide Salk.* 397. *Com. Justices I.* 3. 2d. Ed. vol. 4. p. 5.

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words at common law, 2 *Roll. Abr.* 78. 2 *Inst.* 181, it was a great question, whether this custom, to proceed in another manner than the common law would allow for words, would be good. For the common law has provided a proper method for punishment of scandalous words, viz. binding to the good behaviour; such words being a breach of the peace. 3. It was resolved, that such information would well lie in the court of aldermen. Though it was objected, that this would be to make the party injured judge in his own cause, the offence being an assault upon one of the aldermen. But *Holt* chief justice said, there was a difference between this case, where the offence is an assault upon an alderman, and if it had been an assault upon the mayor; for the mayor is the head of the corporation, and an integral part of it, without whom the court cannot be held; but otherwise it is in the case of an alderman, for the court may be held without him; and when his cause comes on to trial he ought to leave the bench. And this is like the case of a dean and chapter, or mayor and commonalty. The dean and chapter cannot make a grant to the dean, nor (a) can the mayor and commonalty make a grant to the mayor; but they may make grants to one of the chapter, or of the commonalty respectively. So if the (b) chief justice of the king's bench bring an action in this court the *placita* must be before the other three judges, omitting the chief justice. And he cited a case lately adjudged here between the mayor and commonalty of the city of *London* and *Wood*, *Salk.* 397. where it was held, that an action of debt being brought by the mayor, &c. for a fine for not serving the office of sheriff of *London*, being duly elected, was ill; but it had been otherwise, if it had been brought in the name of the chamberlain. And a *procedendo* was granted for the reasons aforesaid.

(a) *Salk.* 398.

(b) *Vide Salk.*
398.

Machell *vers.* Clarke.

Intr. Pasch.
22 W. 3. B. R.
Rot. 342.

Tenant in tail may by bargain and sale, by a lease and release or by a covenant to stand seised convey a base fee, which will not determine

until the issue in tail enters. *S. C.* *Salk.* 619. 11 *Mod.* 29. *Holt* 615. *R. acc.* 1 *Atk.* 2. *Burr.* 703. and he may convey an estate, which by possibility may not take effect until after his death. *S. C.* *Salk.* 619. 11 *Mod.* 29. *Holt* 615. 3 *Danv.* 198. pl. 10. *R. acc.* *Carth.* 257. But he cannot convey an estate, which is not by the terms of the conveyance to take effect until after that period. *S. C.* *Salk.* 619. 11 *Mod.* 29. *Holt* 615. 3 *Danv.* 198. pl. 10. *R. acc.* *Carth.* 257. unless such estate is made to arise out of another which has continuance afterwards. An use which is executed by the statute of uses arises out of the estate of the trustee, and the estate of the trustee continues during the whole term for which it was raised. A covenant by a man who has an estate of inheritance to stand seised to the use of himself for life is never good except on account of remainders, and is void, where there are no legal valid remainders limited after it. *S. C.* *Salk.* 619. 11 *Mod.* 29. *Holt* 615.

S. P. Com. 119. with the arguments of counsel, and more at large 7 *Mod.* 12.

Ejectment. Upon special verdict the case was thus, Tenant in tail covenanted in consideration of natural love and affection, to stand seised of the lands in question, to the use of himself for life, remainder to *John Machell* his eldest son in tail, remainder to *Matthew Machell* his second son in tail; and after that he suffered a common recovery

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with single voucher, in which he was tenant to the *præcipe*, which recovery was suffered to other uses. And the question upon this special verdict made in the common pleas was, whether the tenant in tail had made any alteration of the estate tail by this covenant to stand seised, &c. for if he had made any alteration of the estate-tail, then he was become tenant for life with remainder over *ut supra*, and of consequence the recovery suffered by him was a forfeiture of the estate for life, and the new uses limited upon the recovery could not arise; but *e contra* if the covenant to stand seised made no alteration of the estate-tail, then the recovery was well suffered, and the estate-tail barred, and the new uses would arise. And it was adjudged in *C. B.* that the covenant, &c. did not alter the estate-tail, and that the common recovery was well suffered, and the new uses arose. And it was argued at the bar several times, by Mr. *Peere Williams* and Mr. *King* for the plaintiff in error, and by Mr. *Cowper* and Mr. *Bröderick* for the defendant in error. And now this term *Holt* chief justice delivered the opinion of the court, *viz.* of himself, *Powys* and *Gould* justices, (the vacancy made by the removal of *Turton* justice not being then supplied) that the judgment of the common pleas ought to be affirmed. And he said, that though there are many authorities in the point, yet the reason given in the reports of them is not clear, and therefore he would give at large the reason of his present opinion. It has been made a question, if tenant in tail bargains and sells, or leases and releases, or covenants to stand seised of the lands intailed, to another in fee, whether the estate conveyed by the said conveyances determines by the death of the tenant in tail, or whether it continues until the actual entry of the issue in tail. And he held, that such estate continues until the actual entry of the issue in tail, for these reasons. 1. Because tenant in tail himself has an estate of inheritance in him; and before the statute *de donis Westm.* 2. 13 *Ed.* 1. c. 1. it was held, that such estate was a fee-simple conditional; then the statute made no alteration as to the tenant in tail himself, but only makes provision, that the issue in tail shall not be disinherited by the alienation of his ancestor. And by *Co. Litt.* 18. a. it appears that a base fee may be created out of an estate-tail, where it is said, that if a gift in tail be made to a villein, and the lord enters, he hath a base fee. Then if a base fee may be created out of an estate-tail, there is great reason, that the bargainee, &c. of tenant in tail should have it. 2. The tenant in tail has the whole estate in him, and therefore there is no reason why he cannot divest himself of it by grant, bargain and sale, &c. since the power of disposition is incident to the property of every one. 3. It is no prejudice to the issue in tail, and therefore no breach of the statute *de donis*. Indeed there are strong words in the act for restraining alienations

If tenant in tail bargains and sells, leases and releases, or covenants to stand seised to the use of J. S. in fee; the estate does not determine by the death of tenant in tail until the entry of the issue. Wright's Ten. 186, 187, &c. Plowd. 557. Cro. Car. 499.

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to the prejudice of the issue in tail, where it says, *quod finis ipso jure fit nullus, &c.* yet the construction of the said words hath always been, that the entry of the issue is tolled by such fine, and he is driven to his formedon: therefore, if an act, which drives the issue in tail to his formedon, will not be a breach of the statute; much less will it be a breach of the statute, to drive the issue in tail, to enter to avoid a bargain and sale by his ancestor. As to authorities, 10 Co. 95. *Seymour's case* is in point, where it is held, that the bargainee of tenant in tail has a descendible estate, of which his wife shall be endowed; and that a fine afterwards levied by tenant in tail barred the issue in tail, but did not enlarge the estate of the bargainee, the estate-tail being before converted into a base fee by the bargain and sale. And if the fine there had enlarged the estate, it would have created a discontinuance, and then the collateral warranty had been a bar to him in remainder. In 3 Co. 84. in the case of fines, the case of *Litt. sect. 613.* is put and considered; and there it is held, that the words ought not to be literally understood, but in another sense. The words of *Littleton* are, that if tenant in tail grants *totum statum suum* to J. S. and his heirs, and makes livery of seisin to J. S. yet the estate of J. S. is determined by the death of the tenant in tail. But this ought to be understood, that it is no discontinuance, but will drive the issue in tail to enter to avoid it. Tenant in tail of a rent or common grants it in fee; the grant does not determine by his death, but at the election of the issue in tail. And therefore according to the case put in the case of fines, if a warranty be annexed to the grant, and the issue in tail brings a formedon, the warranty will bar him. *Winch. 5.* Tenant in tail bargains and sells his land to J. S. in fee, J. S. sells to the issue in tail being full of age, then tenant in tail dies; and the question was, whether the issue in tail was remitted; and *Hobart* held, that he was, *Hutton* and *Warburton* held the contrary. But that question supposes, that the estate of J. S. continued after the death of the tenant in tail. *Bridgm. 92. accord.* If tenant in tail makes a lease for years not warranted by 32 H. 8. c. 28. the issue in tail must enter to avoid it; and if he accepts rent become due afterwards, that will make the lease good as to him; which could not be, if the lease was actually determined by the death of tenant in tail. In cases of exchange the (a) estates exchanged must be equal in quality, and yet tenant in tail may exchange his lands with tenant in fee of other lands; and it will be a good exchange, till it be avoided by the issue in tail. *Co. Lit. 51. a.* And in the said case the tenant in tail passes a fee by the word exchange without livery of seisin, and it does not amount to a discontinuance. *Co. Lit. 332. a.* but it passes only a base fee: and if the heir in tail will avoid it, he must waive the lands given in exchange; for if he occupies them, he will be bound for his life. For if he

See 3 Willson.
Hil. 14 G. 3.
The Provost
and College of
Eton v. The
Bishop of Win-
chester and
Fountain, as to
cases of ex-
change.

(a) D. acc.
2 Bl. Comm.
323.

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he had not a fee, the exchange had not been good, because the estates had not been equal. 2. Though tenant in tail by bargain and sale, lease and release, or covenant to stand seised, may create a base fee; yet in this case the tenant in tail did not create a base fee by his covenant to stand seised; because an estate made by tenant in tail, which will not take effect till after his death, is void. If tenant in tail makes a lease for years to commence after his death, it is void in its creation. *Dier* 279. pl. 7. *Cro. Ja.* 455, *Lady Griffin v. Stanhope*.

Objection. He has here made himself tenant for life.

Answer. That will not alter his estate, unless for the sake of the remainders. As if tenant in fee covenants to stand seised to the use of himself for life, it is void; but a covenant to stand seised to the use of himself for life, remainder to J. S. or to the use of himself in tail, will be good for the sake of the intail, or of the remainder. But here the remainder is *ipso facto* void, and therefore will not make the estate for life good, which otherwise would be void also. The reason why an estate made by tenant in tail to commence after his death is void, is because then the issue has a right paramount *per formam doni*. There is express authority in this case. 2 Co. 52. *Cro. Eliz.* 279. *Yelvert.* 51. *Moor* 883. 1 *Leon.* 110. 1 *Anderf.* 291. 3 *Leon.* 291. *Cro. Eliz.* 895. *Beddingfield's case*. Which last book seems to give the true reason, *viz.* because the estate there was to commence after the death of the tenant in tail. But an estate granted by tenant in tail, which must, or which by possibility may, commence in the life of the tenant in tail, is good. He said further, that the case of fines, 3 Co. 84. supported him in maintenance of this opinion against *Littleton*. And *Hob.* 399, says, that *Littleton* was confounded in himself, when he held, that a grant of *totus status suus* by tenant in tail put the tail in abeyance. All the books agree, that the inheritance is out of the tenant in tail. And in the same place *Hobart* says, that the law abhors abeyance; therefore the inheritance must be rather in the releasee, than in abeyance.

Objection. 1 *Saund.* 260, *Took v. Glascock*. It is held, that if tenant in tail bargains and sells his land in fee, the bargainee has an estate but for the life of tenant in tail; for a devise by him is adjudged void, because tenant *pur auter vie* cannot devise by the statute of H. 8. of wills.

Answer. The case of *Took v. Glascock* is not law; for there the tenant in tail after the bargain and sale, and after the death of the bargainee, levied a fine to a stranger; and

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A fine levied to a stranger may extinguish a right, but can not increase an estate.

it is held there, that the fine enured to the benefit of the heir of the bargainee: but that is impossible; for if tenant in tail bargains and sells to *J. S.* in fee, and thereby an estate *pur vie* only passes, viz. for the life of the tenant in tail, and that descends to the heir of the bargainee but as special occupant; the fine levied to a stranger cannot change his estate *pur autre vie* into an estate of inheritance; for there is no instance in the law, that a fine levied to a stranger can increase; but it may extinguish a right: therefore the case of *Took v. Glascock* is contradictory in itself, and hath no reason to support the resolution given. Upon the whole matter he held, 1. That if tenant in tail conveys the lands intailed by bargain and sale, lease and release, or covenant to stand seised to the use of another, in fee, and dies; a base fee passes by the conveyance, and the estate continues, until it be avoided by the issue in tail by entry. 2. That if tenant in tail covenants to stand seised to the use of the covenantee for life, remainder to *J. S.* in fee; or to the use of *J. S.* for life, remainder to *J. N.* in fee; the remainder is good, till avoided by the entry of the issue in tail; although tenant in tail dies, before the remainder takes effect: because the estate for life takes effect immediately, and the remainder might by possibility have taken effect in the life of the tenant in tail. 3. If tenant in tail leases and releases to *J. S.* in fee, to the use of himself for life, remainder to *J. N.* in fee after his death; this remainder is good, though it is to commence after the death of the tenant in tail, because it arises out of the estate of the releasee, which estate would have been good till avoided by the entry of the issue in tail. 4. That in this case the estate being raised by covenant to stand seised, without transmutation of the possession, or any alteration of the estate made, except the remainder which is void, and therefore works no alteration of the estate tail; the recovery was good, and docked the intail, and the new uses limited upon it well arose; and therefore that the judgment of the common pleas ought to be affirmed.

Note, *Holt* chief justice said, after delivery of the argument aforesaid, that he had not communicated these reasons to his brothers; and therefore if they did not agree with them, he prayed them to declare themselves thereupon. *Gould* justice said, that he agreed in all, *Powys* justice *tacite*.

Smith *vers.* Angell.

Intr. Pasch.
13 W. 2. B. R.
Ret. 325.

THOMAS Smith and Margaret his wife executrix of Matthew Field, brought debt against the defendant John Angell, as heir to his father Justinian Angell, upon divers bonds, in which the said Justinian bound himself and his heirs to the said Matthew Field. The defendant comes and defends the wrong and the force, when, &c. and saith, that he cannot deny, but the bonds are the deeds of his father, nor that he detains the several sums of money, &c. but for plea he saith, that his father Justinian Angell in his life, viz. 1679. was seised in his demesne as of fee *de et in tribus quartis partibus toto in quatuor partes dividendo sex acrarum terrae vocatarum Ravensey Spurne, &c. in comitatu Ebor.* and being so seised in his life-time by a certain indenture made at London 17 July 1679. demised to H. Greenwood the said three fourth parts, &c. for five hundred years to be computed from the making of the said indenture, which he produceth in court; by virtue of which demise H. Greenwood entred into the said three fourth parts, &c. and was thereof possessed; that afterwards the first of October 1681, his father died; after whose death the reversion of the said three fourth parts, &c. descended to the defendant as son and heir to his father, *per quod idem* the defendant *semper postea hucusque fuit seifitus et adhuc seifitus existit de reversione tenementorum praedictorum in dominico suo ut de feodo*; and he farther saith, that he hath not any other lands or tenements by hereditary descent from his father aforesaid in fee simple, nor had the day of the exhibiting of the plaintiff's bill, nor at any time since, besides the reversion aforesaid; and he farther saith, that after the death of his said father and the descent of the reversion aforesaid, viz. the twenty-third of November 9. Will. 3. in quadam *sesta* in chancery *pendente inter quosdam Edwardum Thompson armigerum et alios querentes quandam Elizabetham Angell nuper uxorem praedicti Justiniani Angell et ipsum* the defendant it was by the said court of chancery decreed, that the said Elizabeth *haberet et gauderet unam tertiam partem praedictarum sex acrarum terrae, &c. for her life for her dower, virtute cujus decreti ipsa praedicta Elizabetha fuit et adhuc existit seifita de et in praedicta tertia parte, &c. as of her freehold for her life; et hoc paratus est verificare, unde petit judicium si ipse as son and heir of the said Justinian de debito praedicto praeterquam de praedicta reversione de praedicto termino annorum et praedicto statu praedictae Elizabethae pro termino vitae suae de et in praedicta tertia parte quando separaliter acciderint virtute separalium scriptorum obligatoriorum praedictorum onerari debeat, &c.* The

In an action against an heir on the bond of his ancestor, if he plead a bad plea, a general judgment de bonis propriis shall be entered against him.

S. C. Salk. 354. 7 Mod. 40.

Vide 8 Co. 134.

2. Com. Plead.

2. E. 5. 2d. Ed.

vol. 5. p. 213.

unless the plaintiff will consent to take a special judgment. S. C. 7 Mod. 40. vide Poph. 155.

W. Jon. 88.

All immediate estates of freehold which descend upon an heir are immediate assets.

S. C. Salk. 354.

7 Mod. 40.

Altho' they may be expectant on estates for years.

S. C. Salk. 354.

7 Mod. 40.

R. acc. 2 Will.

49. D. acc. 2

Atk. 294.

Vide Com.

Assets. A. 2d Ed.

vol. 1. p. 398.

A decree in

chancery cannot

convey an estate.

S. C. Salk. 354.

7 Mod. 40.

The wife of a

tenant in com-

mon is to be

endowed in

common. acc.

Co. Litt. 32. b.

Litt. f. 44.

But the wife of

one sole seised

must be endowed

by metes and

bounds. acc.

Litt. f. 36.

Co. Litt. 32. b.

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plaintiff prays *oyer* of the deed of demise; which being read, it appears, that there was a proviso, that if the defendant's father paid 50 *l. per annum* to *Greenwood* for his life, the said demise shall be void; and then he replies (*protestando*) that *Greenwood* did not enter, nor take the profits) that after the death of his father, *viz.* the second of *October* 1681, the defendant entred, &c. as son and heir to his father, and was seised thereof in his demesne as of fee, and being so seised, afterwards, *viz.* the tenth of *May* 12 *Will. 3.* received *assets* of the profits, to satisfy the plaintiffs' debt over and above the annuity of *Greenwood*. The defendant rejoins *protestando* that he did not receive *assets* of the profits to satisfy the plaintiffs' debt, for plea he saith, that he did not enter, *modo et forma prout, &c. et de hoc ponit se super patriam*. Upon which the plaintiffs demur, and the defendants join in demurrer. This case was argued several times at the bar by Mr. *Boult*, Mr. *Raymond*, and Mr. *Her-ring*, for the plaintiffs, and by Mr. *serjeant Hall*, Sir *Bartholomew Shower*, and Mr. *Chesbire* for the defendant. And it was agreed by all, that the plaintiffs ought to have judgment; but the question was, whether they should have a general judgment against the defendant, or only a special judgment of the *assets* confessed. And *Holt* pronounced the resolution of the whole court, *viz.* of himself, *Pewys* and *Gould* justices, that the plaintiffs ought to have a general judgment, upon which his body, his own lands and goods (though not *assets*) might be taken in execution. And he said he would consider, 1. The pleading of the lease for years, whether it is good for the heir or not, to hinder the plaintiff from having immediate execution. 2. The pleading of the assignment of dower to the wife in chancery, and that he has only a reversion expectant upon an estate for life. 1. As to the first, the question is, whether the heir ought to plead the lease for years in delay of execution of the plaintiffs, or ought to confess *assets* in possession. He said, he had known the lease pleaded, and therefore he was unwilling to deliver a decisive opinion in that point, because it is not now material in this case; but it seemed to him, that the heir ought not to plead the lease, but ought to confess *assets* in possession, without taking notice of the lease for years; for the having of the freehold and inheritance of the lands of the ancestor descended to the heir makes complete *assets* (as in this case the defendant hath) in possession. But if the ancestor had made a lease for the life of *J. S.* and died, and the reversion had descended to the defendant; there he would have had only *assets* in reversion. Moreover at common law terms for years were not regarded, but were subject to the power of the tenant of the freehold, and would be bound by a recovery suffered by him, 2 *Inst.* 321. *Co. Lit.* 42. And after the statute of *Gloucester*, if the tenant for years did not come in before

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before judgment, he could not falsify, which was remedied by 21 H. 8. c. 15. At this day if the reversioner expectant upon a lease for years brings an assize, the defendant cannot plead, that there is a prior lease; but the lessee for years ought to come in by virtue of the 21 H. 8. c. 15. and falsify the recovery. And the same reason holds place in this case, why the lease for years should not be pleaded, viz. because the bond of the ancestor attaches the land descended as *assets* in possession. 43 Edw. 3. Bro. *Assets* 9. there is a case strong in point. In a *scire facias* the defendant pleaded a confirmation with warranty and *assets* descended; the plaintiff replied, that his father was indebted to the king, and that thereupon the land was committed to the plaintiff, and traverses any other *assets*, and the replication was held ill, because the freehold and inheritance descending are immediate *assets*, and consequently the lineal warranty and *assets* a good bar; the book admits, that the plaintiff might have made use of the lease for years to have diminished the value of the *assets*, but nevertheless it was held there to be immediate *assets*. If this were a good plea, the consequence of it would be, that an immediate judgment ought to be given for the plaintiffs, and an *extendi facias* ought to issue upon it, and the sheriff ought to value the *assets*, and deliver the reversion *quando acciderit*; that is the course, where an estate for life *in esse* is pleaded by the heir. Dyer 373. pl. 14. Hearn's Pleader 307. in case of a lease for years, as in this case. But in the present case if the heir had confessed *assets* in possession, it would not be a prejudice to any: for if the plaintiff sued execution, the termor for years might defend himself in an ejectment brought upon the return of the extent. But he declared still, that he gave no positive opinion as to this point, because it was not necessary to the matter in question. 2. But as to the second point he held, that the pleading of the assignment of dower in chancery to the wife, whereby the defendant had but a reversion expectant, &c. was ill, and let in the plaintiffs to have a general judgment. 1. Because a decree in chancery cannot carry any estate; and dower cannot be assigned there, unless where the heir of the king's tenant is in ward, and in such case it is assigned in court, which is more usual, or a writ issues to the escheator to do it. Fitz. Nat. Bre. 263. If it had been said, that the heir had assigned in obedience of the decree, it might have been good; but there the tenant in dower had been in by the assignment, not by the decree. Then this being pleaded ill, is a confession of present *assets*. 2. The plea is, that the wife was endowed of the third part of the six acres, whereas the ancestor had but three fourths of the six acres, and that in common. Now the wife of tenant in common ought to be endowed in common, the wife of one sole seised, by metes and bounds. But the pleading is of the

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indowment of one sole seised, but then the parcels ought to be shewn in certainty. Besides, that by pleading, that the wife was endowed of a third part of the six acres, whereby she was seised for life, the reversion to the defendant; he admits himself to have the reversion of a third part of a fourth part of the six acres more than he has pleaded; and therefore he will be charged of his own estate. *Plowd.* 440. the case of *Davis v. Pepys*, that if the heir does not confess the action, and shew the certainty of *assets* that he hath by descent, but pleads *riens per descent*, or judgment is given by default, *nil dicit*, or confession, or upon any other ground or matter whatsoever, without confessing the *assets* and the certainty of them; execution shall issue against his body, lands, and goods, as if it had been given upon his own bond; which resolution has always been held law. *Moor* 522. *Cro. Eliz.* 693. 2 *Leon.* 11. in point. And in such case the court cannot give a special judgment, unless the plaintiff assents to it, and then they may. 2 *Roll. Abr.* 71. If in this case a special judgment should be given for the *assets* confessed, that would be, to allow the plea to be good, which is bad, *viz.* that the defendant has a reversion expectant upon an estate for life, where it appears that he hath not. Therefore since the heir has attempted to delay the plaintiffs of the recovery of their debt by a false and ill plea; he has prejudiced himself, in attempting to prejudice others. If in this case the defendant had pleaded, that he had but a reversion expectant upon an estate for life, and the plaintiffs had replied, that the tenant for life was dead, and upon issue joined it had been found for the plaintiffs; they would have had a general judgment. Now here it is the same thing, since it appears by his plea, that it is false. And therefore a general judgment must be entred against him, which was done accordingly. See 1 *Keb.* 156. *Cudmore v. Lewis*.

Topham *vers.* Tollier.

S. C. Salk. 575. Holt. 621.

A release of all right to the personal estate of an intestate will not discharge a debt due from him. vide *Com. Release. E. 1. ad Ed. vol. 5. p. 411.* Particularly if the release imports to be made for settling disputes which had

arisen between the plaintiff and defendant concerning the right of administration. Vide ante 235.

Yelv.

Yelvert. 214. Bridges v. Eynon. Sed non allocatur. For per Holt chief justice there is a difference between a release of all demands to the person of the obligor or administrator, which is the case in *Yelverton*, and a release of all demands to the personal estate of the obligor or administrator, as the case at bar is. Such release will not discharge the bond, as the other may, because the bond does not give any right or demand upon the personal estate, &c. until judgment and execution sued. And upon a (a) *fieri facias* the goods ought to be sold, though upon (b) extent they may be delivered to the plaintiff. The case of a release by the conusee of a statute, of all his right to the land, is a stronger case; where it is held, that such a release does not prevent an extent; and yet the statute binds the land against any alienation. See 2 Lev. 214. *Morris v. Wilford.*

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v.
TOLLIER.

(a) D. acc.
ante 346.
(b) Vide ante
346.

Molloy *vers.* Lock.

vel

Johns *vers.* Bromfield.

Intr. Hil.
13 W. 3. Rot.
431.

DEBT upon bond. The defendant pleaded, that he delivered it as an *escrow* to J. S. to be delivered to the plaintiff upon conditions to be performed by the plaintiff, which were not performed; *et hoc paratus est verificare.* The plaintiff demurred specially, and shewed for cause, that this plea ought to conclude to the country. And no person appearing for the defendant, judgment was given for the plaintiff.

In an action on a deed, a plea that it was delivered as an escrow ought to conclude to the country.
R. acc. post 303.
Vide 6 Mod. 217.
Plowd. 66.
vol. 5. p. 36.

Com. Pleader. E. 32. 2d Ed.

Vanhatton *vers.* Morfe.

Pasch. 1 Ann.
Rot. 124.

I*ndebitatus assumpsit* for money for goods sold by the plaintiff to the defendant. The defendant pleaded payment. The plaintiff demurred specially, and shewed for cause of demurrer, that the plea amounted to the general issue. *Sed non allocatur.* For *per curiam*, it admits at one time a good cause of action in the plaintiff, and excuses it by matter *ex post facto*, and therefore is an honest and good plea. And judgment was entred for the defendant. (a.)

Matter which might be given in evidence on general issue may be pleaded specially, if it admits the plaintiff had once a cause of action. R. acc. ante 217. 566, & vide 4 Bac. 60.

(a) But it is much to be doubted whether this would be a good plea at this time, because any thing may be given in evidence that destroys the plaintiff's cause of action upon non assumpsit, and payment before the action destroys it. Note to 3d Edition.

Slipper *vers.* Mafon. C. B.

S. C. Lutw. 122. N. L. 43. 3 Danv. Abr. 121, pl. 7. Pleadings Lutw. 121.

Case lies against a sheriff for letting a man arrested on an *excommunicato capiendo*, escape. Vide 6 Mod. 78. Sav. 15.

THE plaintiff obtained sentence against J. S. for 210*l.* in the spiritual court for non-payment of tithes, besides his expences of suit. And for not obeying the sentence J. S. was excommunicate, and arrested upon an *excommunicato capiendo*, and being in custody of the defendant then sheriff of the county, he permitted him to escape. Upon which the plaintiff brought a special action upon his case against the defendant for this escape. And upon not guilty pleaded, the plaintiff recovered a verdict for the 210*l.* Afterwards it was several times moved in C. B. in arrest of judgment, that this action would not lie against the defendant. But it was adjudged unanimously by all the judges of the common pleas, viz. Sir Thomas Trevor chief justice, Nevill, Powell, and Blencowe justices, that the action well lay, Thursday the eighteenth of June, as serjeant Jenner told me. And the court relied much upon the case, where it is held, that case lies against the sheriff, for suffering a man to escape, being arrested upon a *capias utlagatum* after outlawry upon *mesne* process.

Smith *vers.* Walker and Nois.

S. C. Com. 122.

A defendant in replevin is not intitled to costs upon a judgment by confession on the plea of *prisal en auter lieu*. Vide ante 336. post 992. (a)

(a) According to the report in Comyns, this plea was pleaded in abatement, but the plea of *prisal en auter lieu* is properly a plea in bar. Vide Bullythorpe v. Turner. 2 Barnes 281.

(b) *Quære*, for it seems like a nonsuit, in which defendant shall have costs. Note to 3d Edition.

REplevin for taking of cattle at a place called A. The defendants pleaded, that they took them at a place called B. *absque hoc* that they took them at A. The plaintiff confessed it. And thereupon Mr. Eyre for the defendants moved to have costs; and he cited *Cro. Eliz.* 329. *Hasslop v. Chaplin.* *Cro. Jac.* 520. *Samuel v. Hoder.* *Cro. Car.* 497. *James v. Tutney intr. Trin.* 11 *Car.* 1. *Roi.* 753. That the defendants in replevin after judgment for them upon demurrer shall have costs, and after several motions it was resolved *per curiam*, that (b) the defendants in this case could not have costs, because the plaintiff was not barred from having another replevin, and driven to his writ of second deliverance; but notwithstanding this confession and the abatement of this writ he may have a new replevin. But otherwise it had been, if he had been barred from having another writ of replevin by this *prisal en auter lieu*. And if issue had been joined upon the place of the taking, and found for the defendants, they would have had costs. And costs were denied by the whole court.

Camell *vers.* Clavering. *Exchequer.*

AN ejectment was brought in the exchequer *de minutis decimis*. And upon not guilty pleaded, verdict for the plaintiff. And Mr. Chesbire about five or six years ago moved in arrest of judgment, that an ejectment would not lie for small tithes. 1. Because eggs are small tithes; and it is absurd to say, that an ejectment would lie of an egg. 2. Because the sheriff does not know of what he is to deliver possession, upon a *habere facias possessionem*. *Sed non alioquin*. Because it has been adjudged, that an ejectment lies of wool, being tithe, and by the same reason for an egg. And therefore by all the barons judgment was given for the plaintiff. 11 Co. 25. *Ex relatione m^{ri} Chesbire*.

An ejectment lies for small tithes. Vide March. 32. Cro. Car. 301. Moor 837. 2. Crompt. Pr. 2d. Ed. 164.

June 17. Wednesday.

HOLT chief justice declared, that all the judges of this court had made a rule, that no reference whatsoever of any cause depending in this court should stay the proceedings of this court; unless it was expressed in the rule of reference, to be agreed, that all proceedings in this court should stay.

This is matter of practice and is generally determined on affidavits. Note to 3d Edit.

Pentrye *vers.* Trippett.

TO a *scire facias* upon a recognizance of bail the defendant demurred specially, and shewed cause; because neither the term nor the year, when the judgment was given against the principal, was shewn in the declaration. But judgment was given for the plaintiff, because it is the course of the king's bench not to shew them. *Contra* of the common pleas.

This seems bad practice in B. R. and *quare*, whether B. R. does now agree with C. B. note to third Edition.

Dowler *vers.* Keite.

S. C. Salk. 351. Holt 335.

THE defendant was taken into custody by the officers of the court of admiralty by way of execution, being condemned by sentence there. And intending to procure his liberty, he persuades the plaintiff to sue a *habeas corpus ad respondendum* out of this court, to the intent that he should be turned over to the *Marshalsea*, he being in fact indebted to the plaintiff. And he being brought into court, Mr. Salkeld for the plaintiff moved, that the defendant might be committed to the *Marshalsea*. And he urged,

A man shall not be turned over to the prison of a superior court on an *habeas corpus ad respondendum*, unless some action is depending against him in that court when he is brought up.

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Slipper *vers.* Mason. C. B.

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DOWLER
v.
KITE.

1. That if it were denied, there would be a failure of justice, because the sheriff could not arrest and take the defendant out of the admiralty prison; that this court would not permit a failure of justice. And he cited 2 *Inst.* 23. 4 *Inst.* 71. *W. Jones* 380. 2. That a person may be charged in custody of the marshal with the sentence of another court, which this court cannot execute; as a man committed by chancery upon a decree there may be returned over to the marshal of the king's bench upon a *habeas corpus*. 2 *Roll. Abr.* 69. 4 *Inst.* 290. *Hardr.* 476. *Sed non allocatur*. For though upon a *habeas corpus ad subjiciendum* this court upon a charge of treason or felony would have turned the defendant over to the marshal; or if a bill had been filed against him, so that he had been in custody of the marshal before; but yet in this case the court cannot do it, because there is no plea in this court at this time depending against him; and it cannot be, because he is not in *custodia mar-scalli*. And he was remanded by the whole court.

This same term Dr. Thomas Watson, formerly bishop of St. David's, being arrested upon an *excommunicato capiendus* after an excommunication in the spiritual court for non-payment of costs of the suit in which he was condemned, was brought into the king's bench upon a *habeas corpus ad respondendum* *J. S. de placito debiti*, &c. and upon motion by the counsel of *J. S.* that he might be committed to the *Marshalsea*, he was remanded, because no suit was depending here against him, the bill of *Middlesex* not being returnable till next term.

Regina *vers.* Langley.

An indictment does not lie against a man for entertaining vagrants. Vide 17 G. 2. c. 5. s. 23. And if it did, it ought to state that the persons entertained were vagrants at the time when they were entertained. See Burn's Jus. title Vagrant.

AN indictment found against the defendant, for having entertained two idle and vagrant persons in his house, knowing them to be such, was removed into this court by *certiorari*. And upon demurrer to it by the defendant, judgment was given for the defendant, and his recognizance discharged. 1. Because it was not said, that they were vagrants at the time of the entertainment by the defendant. 2. Because the entertainment of them, viz. the giving them meat, drink and lodging, is not any offence within 39 E. c. 4.

Brown *vers.* Mugg.

S. C. but with some difference. Salk. 161. Holt 137.

Judgment. Upon a special verdict the case in effect was thus. The defendant *Mugg* had a benefice with cure of souls, of 8*l.* *per ann.*, to which he was presented by S. and he was instituted and inducted. Then *Mugg* was made chaplain extraordinary to the king, and was presented to the king to another benefice with cure of souls, of 8*l.* *per annum*, and he was instituted and inducted to it. Upon which the king presented the lessor of the plaintiff to the former benefice as by lapse. And it was adjudged after several arguments at the bar, that the plaintiff ought to have judgment, because by the acceptance of the second benefice the former benefice became void; a chaplain extraordinary to the king not having privilege to retain two benefices, with cure of souls, above 8*l.* *per annum* value, without a dispensation. And judgment was given for the plaintiff.

If one of the king's extraordinary chaplains has a benefice with cure of souls of more than 8*l.* a year value, and the king presents him to another of that description, upon his induction there-to the former becomes void.

Vide 2 Brownl. 45. 21 H. 8. c. 13. f. 9. 13. Com. Esq. life. N. 5. 8. 2d Ed. vol. 3. p. 210.

1. According to the reports in Salk. and Holt the court considered the king's presentment virtually including a dispensation, but thought a chaplain extraordinary merely as such, incapable of taking one.

Regina *vers.* Moore.

A Conviction against the defendant for killing deer was removed into this court by *certiorari*, and was quashed, because it said only that he killed deer *in quodam loco* where they had been usually kept, and did not say inclosed.

Vide 3 W. & M. c. 10. f. 2.

Holman *vers.* Burrow.

S. C. but with some difference, Salk. 638.

THE plaintiff brought an action of covenant against the defendant upon an indenture of charter-party, which he alledged in his declaration was made the twenty-sixth of August 13 Will. 3. The defendant prayed *oyer* of the deed; which being granted, it was entered *in hæc verba*: This indenture, &c. made, &c. the six and twentieth of August 1701. And then he pleaded in abatement of the bill this variance in the date of the deed pleaded, and of that shewn upon the *oyer*. The plaintiff demurred. And Serjeant Hall for the plaintiff argued, that this was not a material variance, because the year 1701 was the thirteenth of Will. 3. And the court agreed, that though it was not said in the deed *anno Domini* 1701, yet they would intend 1701 to be the year of our Lord 1701. But Holt said, that the plaintiff, by his *proferet in curia, cujus datus est eisdem die et anno*, had confined himself to the deed dated the thirteenth

If certain figures are put after the day of a particular month which can be supposed to refer to the year of Christ, it shall be intended that it does refer to it.

The courts will take notice of the correspondence between the dominical year and the year of any king's reign.

Therefore a deed which really is dated according to the

teenth

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teenth of *Will.* 3. but the deed produced not being so, it was a material variance. And he inclined for the defendant. *Sed adjournatur.* See afterwards 794. Judgment for the plaintiff, *quod defendens respondeat ulterius.*

Taylor vers. ———

Trover lies against a carrier for refusing to deliver goods given him to carry. Vide 1 Vent. 223. Salk. 655. Burr. 2825. or case, vide post 917, 918. But trover will not lie against him for refusing to deliver goods given to his servant, unless he has been guilty of an actual conversion.

IT was ruled by Holt chief justice, upon a trial at *nisi prius* at Hertford, 4 Aug. 1 Ann. reg. that if goods be delivered to a carrier, and he does not deliver them according to the direction given him; upon demand of the goods from him, and refusal by him to deliver them, trover lies against him, or an action upon the case lies against him upon the custom. But if the goods be delivered to a servant of the carrier, or to his warehouse-keeper, and they are not delivered, &c. an action of trover does not lie against the carrier, &c. without an actual conversion by him.

Regina vers. Sir John Bucknall.

A man cannot be charged with the repairs of a bridge merely because he is lord of a particular manor. S. C. 7 Mod. 54. Holt 128. Vide Shaw's Parish Law. c. 60. f. 4. post 1091. 1 Hawk. c. 76. f. 8. If a man who is bound to repair a bridge in respect of certain lands, aliens any part of that land, an information may be exhibited against such alienor (alone) whenever the bridge is out of repair. S. C. 6 Mod. 150. 7 Mod. 93. R. acc. Salk. 208. 3 Salk. 77.

AN information was exhibited against the defendant for that, that he and all the lords of the manor of D. have time whereof, &c. been obliged to repair a bridge, &c. which was out of repair, &c. Upon not guilty pleaded, and trial before Holt chief justice at *nisi prius* at Hertford, Summer assizes 1 Ann. reg. it was held by him, that a prescription, that the lords of the manor ought to repair the bridge, without saying *ratione tenuræ*, or *ratione terrarum*, was good; because (by him) the manor may have been granted to be held by the service of repairing of this bridge before the statute of *Quia emptores terrarum*; or the king may make such a grant at this day, he not being bound by the said statute. And in pleading one may say, that he is obliged as lord of the manor. But indeed it is by reason of the demesnes of the manor; and therefore if part of the demesnes be granted to J. S. he will be obliged to contribute to the repairs: but the information or indictment may be against any of them; and though it appear upon the evidence, that another is obliged also, yet the defendant must be convicted. And so the defendant was convicted in this case; though he proved upon the evidence, that others were obliged to repair as well as himself. See after 804.

Sands and Tash vers. Ledger.

A deed authorising a man to make leases in possession and not in reversion rendering the ancient rent, and making the tenant liable for waste cannot be represented in pleading generally, to have authorised him to make leases. In debt by a remainder man for rent reserved upon a lease by tenant for life, the plaintiff must shew what authority the tenant for life had to make the lease. If the owner of an estate after granting a lease, settles the estate upon J. S. for life, with power to make leases in possession, J. S. can make no lease until the former one expires. If a lease upon which a gross sum and three fowls is reserved by way of rent is represented in pleading to have reserved the gross sum without mentioning the fowls, the variance is fatal.

AT the Summer assizes 21 July 1 Ann. 1702, at *nisi prius* at Kingston, before Holt chief justice, the case was thus: In debt for rent the plaintiffs declared, that Ro-

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Robert Hatton being seised in fee of the lands out of which, &c. the twenty-eighth of October 1684. by indenture between himself for the first part, William Lambert esquire of the second part, the plaintiffs Sands and Tash of the third part, and Mary sister of Mr. Lambert, the intended wife of Hatton, of the fourth part, covenanted for himself, &c. that he, the same Michaelmas term, should levy a fine of the lands out of which, &c. to the use of himself from life, and after his death to the use of Sands and Tash for twenty-one years, remainder to Thomas Hatton in tail, &c. with power reserved to Robert Hatton at any time during his life to make leases of the lands out of which, &c. for twenty-one years, &c. that the fine was levied accordingly; and that afterwards, viz. ——— 1700. Robert Hatton made a lease to the defendant by indenture rendering rent 15*l.* per annum; that Robert Hatton was dead, and so the rent belonged to the plaintiffs; and for the arrears of one year this action was brought. Upon *nil debet* pleaded, and issue joined upon it, the plaintiffs at the trial gave in evidence this deed of settlement and fine. And upon reading the deed the power appeared to be, to make leases for twenty-one years in possession, not in reversion, rendering the ancient rent, and not dishonourable of waste. And Holt chief justice seemed to be clear of opinion, that this was a material variance. For it was necessary to shew the power to intitle the plaintiffs to this rent; otherwise rent (a) reserved by tenant for life could not come to them in remainder; and this power shewn in evidence is not that of which they have declared; because this is a special power, the other general. But Holt chief justice said, that he would see the nature of the defendant's defence. Upon which the defendant gave in evidence a lease of the same lands made by Robert Hatton in 1693 to Tash and Mr. Lambert for twenty-one years, if he and J. S. should so long live. And Holt chief justice held, that by this lease the power was suspended for the time of the lease; but that being expired, he inclined, that the second lease was good. Note, J. S. was also dead. Then Mr. Raymond saw a variance between the lease shewn in the declaration, and that shewn in evidence, viz. the declaration was of a lease rendering 15*l.* per annum rent, and this produced in evidence was rendering 15*l.* per annum rent and three fowls. Upon which the plaintiffs were nonsuit.

(a) Acc. 1 P.
Wms. 392.
Prec. Champ.
556, 557.

Michaelmas Term

1 Annæ reginæ, B. R. 1702.

Memorandum, That the first day of this term William Jennings esquire of the Middle Temple took his place in Chancery as one of the Queen's counsel, within the bar, being sworn before.

Holman *vers.* Burrow, ante 791.

Plea in abatement pleaded after adjournment of part of the term and death of the king.

COVENANT. The plaintiff declared upon an indenture of charty party *cujus datu*s fuit *vicesimo sexto die Augusti decimo tertio anno regni Willielmi tertii nuper regis, &c.* This declaration was delivered of Hilary term 13 Will. 3. The defendant in Easter term following pleaded in abatement. And by reason of the death of the king, and of the adjournment of Easter term from *quindena Paschæ* until *tres Paschæ*, the entry upon the record by the advice of all the practicers, and by the approbation of the chief justice, was thus, *viz. Et (quia ante diem Mercurii proxime post quindenam Paschæ ultimo præteritum usque quem diem prædictus Thomas Burrow salvis sibi omnibus et omnimodis exceptionibus quoad billam prædictam habuit licentiam ad billam prædictam interloquendi et tunc ad respondendum, &c. coram dicto nuper domino rege apud Westmonasterium, dictus dominus rex Willielmus tertius diem suum clausit extremum et ante eundem diem loquela prædicta adjournata fuit per breves dominae Annæ nunc reginæ Angliæ de communi adjournamento coram eadem domina regina apud Westmonasterium usque ad et in hunc diem scilicet a die Paschæ in tres septimanas isto eodem termino) modo ad hunc diem scilicet a prædicto die Paschæ in tres septimanas coram domina regina apud Westmonasterium venit tam prædictus Benjaminus Holman per attornatum suum prædictum quam prædictus Thomas Burrow per Joannem Bernard attornatum suum, Et idem Thomas defendit vim et injuriam quando, &c.* And he prayed *oyer* of the said indenture, which was entered in *hæc verba*, This inden-

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indenture made the twenty-sixth of *August* 1701. and does not say *anno Domini*, &c. And then he pleaded a variance between the indenture in the declaration, and that shewn upon *oyer*, viz. he declared upon an indenture made the twenty-sixth of *August* 13 *Will.* 3. and this shewn upon the *oyer* is dated the twenty-sixth of *August* 1701. The plaintiff demurred. And last term to maintain this plea Mr. *Raymond* urged, that the indenture not being said to be made *anno Domini*, the court cannot understand, what is meant by 1701 in figures. *Sed non allocatur*. For the court understands well enough, that the indenture meant by it the year of our Lord. Then he urged, that although the twenty-sixth of *August* 13 *Will.* 3. and the twenty-sixth of *August* 1701. were the same day, and that notwithstanding the court took notice of the year of the reign of every king, in what year of our Lord it happened; yet the plaintiff by his *cujus datus* had confined himself to the very date in his declaration, and therefore that this was a variance. And *Holt* chief justice seemed then to be of the same opinion, and it was adjourned. But afterwards in this term he and all the other judges held, that the twenty-sixth of *August* 13 *Will.* 3. and the twenty-sixth of *August* 1701. were the same day; and therefore they awarded, that the defendant should answer over. See *Cro. Jac.* 261. *Dobson v. Keyes*. *Postb.* 10 *Will.* 3. *B. R.* *Cromwell v. Grumfden*, ante 335.

Stanian *vers.* Davies.

S. C. 6 Mod. 223. *Holt* 13.

Intr. Hill. 23
W. 3. B. R.
Rot. 179.

ERROR upon a judgment against *Davies* in the court of the *Marshalsea* in an action brought against him there by *Stanian*, in which the plaintiff *Stanian* declared, *quod cum idem* the plaintiff *primo Octobris* 13 *Will.* 3. *apud parochiam sancti Martini in campis in comitatu Middlesex ac infra jurisdictionem hujus curiæ* (viz. the *Marshalsea*), &c. *praedictus Griffith Davies* the defendant *adunc necnon diu antea et postea quoddam commune hospitium vocatum the Red Lion apud parochiam praedictam et infra comitatum et jurisdictionem praedictos existens tenuit et custodivit, et praedictus* the plaintiff *quosdam spadones ipsius* the plaintiff *pretii viginti librarum in stabulis praedicti* the defendant *infra hospitium praedictum sub custodia praedicti* the defendant *ad pabulandos et salvo custodiendos et eidem* the plaintiff *cum inde postea requisitus esset redellbe- randos pro rationabili pretio inde per ipsum* the plaintiff *eidem* the defendant *solvendo posuit*. [Then there was another

If a thing is delivered to a man upon particular terms, it shall be presumed that he agrees to those terms.

In all actions in inferior courts, the gist of the action must be stated to have arisen within the jurisdiction. S. C. *Salk.* 404. 11 Mod. 7. R. acc. 12 Mod. 593. post 1310. 1 T. R. 151. Vide 1 *Freem.* 317.

Matter of aggravation need not. S. C. *Salk.* 404. 11 Mod. 7. In an action against an innkeeper for keeping a horse so negligently, that he was ridden, the negligent keeping is the gist of the action. S. C. *Salk.* 404. but with some difference. 11 Mod. 7. The riding matter of aggravation only. S. C. *Salk.* 404. 11 Mod. 7.

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count upon the general custom of innkeepers. *Praedictus* tamen the defendant intending to defraud, &c. the plaintiff *postea scilicet eisdem die anno et loco spadones praedictos adtunc et ibidem tam negligenter et improvide custodivit quod spadones illi ob defectum curae et custodiæ of the defendant adeo vehementer et graviter equitati fuerunt et tam graves istius verbera et contusiones receperant et sustulerant, quod spadones illi deteriorati et totaliter spoliati fuerunt et nullius usus seu valoris devenerunt et eidem the plaintiff ulterius deservire non potuerunt, et idem the plaintiff divers sums of money in et circa curationem spadonum praedictorum expendere et erogare coactus fuit, ad damnum 20l. Upon not guilty pleaded, verdict was given for the plaintiff upon the first count, and 5l. damages; and as to the second count the verdict was for the defendant. And judgment for the plaintiff. And error brought in this court, and general errors were assigned. And for the plaintiff in error Mr. Raymond argued, that the judgment was erroneous. 1. Because the declaration was ill; for it cannot be pretended, that this action is maintainable upon the common custom concerning innkeepers, because it is not shewn, that the plaintiff was a guest: then it is the premium to be given to the defendant for the maintaining of these horses which alone can maintain the action; but then it ought to be shewn in the declaration, that the defendant agreed to maintain and keep the horses for a premium; which is not done here, and therefore the declaration is ill. *Sed non allocatur.* For since it appears by the declaration, that the horse was delivered to the defendant himself, to be kept, &c. for a reasonable price to be paid to the defendant by the plaintiff, one cannot intend, but that the defendant agreed to it. Then he assigned another error, that it does not appear, that the cause of action arose within the jurisdiction of the *Marshalsea* court; for though it is said, that the defendant *ad tunc et ibidem* negligently kept the horse, yet it is not said, that he was rid and abused *adtunc et ibidem*. Now the damages, which the plaintiff sustains by the riding of the horse, are the ground of this action, and not the negligence of the defendant in keeping him. And in case of inferior courts nothing is ever intended to arise within the jurisdiction, unless it is expressly averred to do so. 1 Saund. 73. *Peacock v. Bell and Kendall.* T. Jones 103. 3 Keb. 677. *Harvey v. Holland.* 1 Ventr. 28. *Berkley v. Paine.* 1 Ventr. 2. in the case of *Healey v. Ward.* T. Jones 230. *Wallis v. Squire.* 1 Sid. 95. *Raym.* 63. *Littlebury v. Wright*, case for calling the plaintiff whore, laid to be within the jurisdiction of the court, *per quod* she lost her marriage, and does not aver that to have been within the jurisdiction of the court: judgment for the plaintiff in the palace court, and upon error reversed, because the loss of the marriage, which was the ground of the action, and without which it would not lie, was not alledged to be within the*

the jurisdiction of the court. 1 Roll. Abr. 545. pl. 3.
Jurie v. Storie. Cro. Car. 571. W. Jones 451.

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E contra it was argued by Mr. *Ward* for the defendant in error, that the negligence of the defendant is the original cause of the action. And for that he cited *Rast. Entr. 3. Regist. 106.* And that the riding, &c. were only aggravation of damages, and not the *gist* of the action; and then though it was done in another place out of the jurisdiction of the court, yet the said court may have jurisdiction of it. And for that he relied upon the case in *Cro. Car. 570. Ireland v. Blockwell.*

But *Powell, Powys, and Gould* justices, were of opinion for the plaintiff in error, that the riding, &c. was the cause of action, without which it would not lie; and therefore it ought to have been averred to arise within the jurisdiction of the court. And *Powell* justice said, it was impossible for the defendant, to maintain his judgment. But upon the importunity of Mr. *Ward* it was adjourned, *absente Holt* chief justice. And afterwards *Mich. 3.* adjudged, that the judgment should be affirmed, *mutata opinione* of the three judges. *post 1840.*

Finn *vers.* Hutchinson.

UPON a reference to the master, to examine the regularity of obtaining a judgment against the defendant; the master reported, that the defendant was in prison in the gaol of the town of *Newcastle* at the suit of *J. N.* and during his confinement there, he at the request of the plaintiff, but voluntarily, gave a warrant of attorney to the plaintiff, to enter judgment against him in the king's bench, for a debt owing by him to the plaintiff: but at the time of the delivery of the warrant of attorney the defendant's attorney was not present. And whether this were cause, to set aside the judgment entred up on the said warrant, after execution executed upon it a year before, was the question. And *per curiam*, the defendant not being then in prison at the plaintiff's suit, might very well give such warrant in the absence of his own attorney. For the reason of the rule, that the attorney of the defendant being under confinement, shall be present, when he gives a warrant to confess judgment, is to avoid all practices on the part of the plaintiff, and to see that it is done without duress of imprisonment. But the said cause fails here, where the defendant is not in prison at the plaintiff's suit, nor abused by any artifice used by him. And therefore the whole court held the judgment well given, and discharged the rule.

(a) But the courts hold that some attorney must be present, *Note to 3d Edition.*

A man in custody of the sheriff at the suit one person may give a warrant of attorney to confess a judgment to another without having an attorney on his part present. (a) R. acc. Burr. 1792. vide Rule 4. G. 2. Str. 1245. 1247. Crwp. 231. Bl. 1067. 1297. 1 T. R. 715. 3 T. R. 616.

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of reference. Mr. *Lechmere* counsel with the defendant, Mr. *Raymond* with the plaintiff.

Mich. 12 W. 3.
n. 8.

Regina vers. Inhabitantes Abberford East.

R. acc. 1 Keb.
685.
Cases of Settlements. 220. pl.
259.
Comb. 25.

AN original order made at the general quarter sessions for the West Riding of *Yorkshire* (whereof the tenor was thus, *viz.* It is ordered that the churchwardens and overseers of the poor of the parish of *Abberford* do make an assessment to the church and poor by a pound rate, and in the said assessment do assess *Graystonfield* lands and all other lands within the said constabulary to the use aforesaid equally by a pound rate) was removed with other orders in *B. R.* upon a *certiorari*. And Mr. *Raymond* moved to quash this order, because the justices have not any jurisdiction to make such original order at the quarter sessions, though it had been otherwise if it had come before them by appeal. And a day was given to hear counsel of both sides. At which day no body appearing to maintain the order, he moved to quash it the next day. Which was granted by *Powell*, *Powys* and *Gould* justices, *absente Holt* chief justice, *Powell* justice saying, that it was impossible to make it good.

Intr. Trin. 12
W. 3. B. R.
Rot. 454.
Mich. 10 Will. 3.
C. B. Rot. 659.

A release shall prima facie be intended to enure to the use of the releasee, tho' the consideration upon which it was made does not appear. S. C. Salk. 678. 3 Salk. 386. 7 Mod. 71. Holt 621. vide ante 211. Com. Dig. Uses. D. 2. 2d. Ed. vol. 5. p. 621.

After pleading a bargain and sale for a year and a

release if the party adds by virtue of which said bargain and sale and release, and by virtue of the statute of uses the bargainee became seised, the allegation is informal. But no objection can be made to it except on a special demurrer. No demurrer is to be considered as a special one which does not point out expressly the particular defect; a demurrer assigning for cause that the declaration wants form, is a general one. R. acc. 1 Will. 219. a writ of inquiry may rectify the declaration in *hæc verba*. In covenant for not repairing premises the jury ought to give in damages sufficient to put them into repair. S. C. 7 Mod. 71. D. acc. post 1125.

Shortridge vers. Lamplugh.

Declaration. Lutw. 351.

ERROR upon a judgment given in *C. B.* in an action of covenant brought by *Thomas Lamplugh* against *Elizabeth Shiers*. The plaintiff declared, that *Thomas Abby* being seised in fee of a piece of ground in *Westminster*, the eleventh of *May 3 Will. & Mar.* by indenture then bearing date demised it to *John Griffub* for sixty one years, rendering a pepper-corn rent for the first year, and 100 *l. per annum* for the sixty years ensuing; in which indenture *Griffin* covenanted for himself, his heirs and assigns, to pay the said rent, and to maintain the houses agreed to be built upon the said ground in good repair; that *Thomas Abby* by indenture dated the twenty-eighth day of *September 3 Will. & Mar.* in consideration of 5 *l.* bargained and sold the premises to *Sir Philip Meadows* and others for one year; and that the said *Thomas Abby* by indenture dated the twenty-

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ninth of September following released and confirmed the said premises to the said Sir Philip Meadows and the others in fee; by virtue of which indentures of bargain and sale and release, and by virtue of the statute of 27 H. 8. c. 10. for transferring uses into possession, they were seised of the reversion in fee; then he shews a lease and release from Sir Philip Meadows and the other grantees to Lamplugh in the same manner as he had pleaded the former lease and release; then he shews that the interest of Griffin came by assignment the twenty-first of May 4 Will. & Mar. to Elizabeth Shiers; and then he assigns a breach in non-payment of rent due for five years and a half, and in default of repairs. The defendant demurred to this declaration, and shewed for cause, that the declaration *est duplex et caret forma*. And after argument, judgment was pronounced in C. B. for the plaintiff, and a writ of inquiry was awarded, and damages given 760l. and then final judgment was entered for the plaintiff. Upon which Elizabeth Shiers the defendant brought a writ of error; and pending it, she died. And Shortridge as executor to Elizabeth Shiers brought a writ of error *coram vobis refidet*, and assigned the general errors. And it was argued by Mr. Peere Williams and Mr. Raymond at several days for the plaintiff in error, and by Mr. serjeant Darnall, Mr. Broderick and Mr. Weld, for the defendant in error. And the counsel for the plaintiff argued, that the judgment was erroneous, and ought to be reversed, because the plaintiff had not intitled himself to his action of covenant; for he makes title to it as grantee of the reversion, and he has not intitled himself well to the reversion, because he makes title to it by lease and release, but he has not shewn, that the release was made upon any consideration, nor is there any use declared; the consequence of which is, that although the estate in law passed by the release from the releasor to the releasee, yet the use remained in the releasor, which drew back to it the estate in law again; and so the reversion continues, notwithstanding any thing that appears to the contrary, in Thomas Asby and his heirs; and therefore that the plaintiff could not maintain this action. And they argued, that although at common law he who had the estate in the land had also all that one could have there, uses not being then invented (for they were afterwards invented by the men of religion, after all other attempts had been frustrated, to avoid the statutes of mortmain, *Mag. Chart. c. 36. 7 Edw. 1. de religiosis, West. 2. c. 32.* as appears by 2 Leon, 14. Brent's case, 2 Inst. 75. and in the time of the wars between the houses of Lancaster and York they were encouraged for the mutual convenience of both parties, in the preventing of escheats and forfeitures): nevertheless, after that they were invented, and that feoffments to uses were become a sort of common conveyance (which happened in the reigns of Henry 6. and Edward 4. as appears

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by the reports) the estate in the land, and the use of it, were regarded as distinct things: and then a man might have conveyed the estate to another, and retained the use to himself; or might have passed the estate to *A.* and the use to *B.* or might have granted the use, and retained the estate to himself: but the conveyance of the estate in the land did not convey the use, unless a good consideration was mentioned in the conveyance; or that the intent of the parties appeared, that the use should pass, as well as the estate. Therefore before the statute of 27 *H. 8. c. 10.* if *A.* made a feoffment, levied a fine, or suffered a common recovery, without a use declared, and without consideration, of lands, &c. the feoffee, donee, and recoveror, stood seised of the said lands to the use of *A.* Then since the statute of *Henry 8.* the law as to this matter is not altered; for the said statute intended only to execute the use in the possession, and by that means to destroy the use; but it did not intend to make any other thing pass by the conveyance, than that which passed before. And therefore the use, not passing by the release in this case, drew back to itself the estate passed by it; and the statute executed it in possession. And to prove, that a feoffment made without consideration or use declared would at this day be to the use of the feoffor, *Dyer 146. 2 Roll. Abr. 781. F. Co. Litt. 271, 23.* were cited. The (a) same law of a fine, 2 *Co. 58. Beckwith's case.* The (b) same law of a recovery, *Latch. 82. Palm. 462. Argoll v. Chyney.* Now there is the same reason, that the use should not pass by the release without consideration or use declared, as for a feoffment, fine, or recovery. As to the precedents cited by the counsel for the defendant in error, where feoffments are pleaded without consideration shewn, or use declared, *Co. Entr. 410, 11. Horns 25. Winch. Entr. 1120. 2 Brown, Entr. 152. Robins. Entr. 468.* release pleaded to lessee for life without consideration or use shewn. *Co. Entr. 69. Rast. 694, &c.* it was answered, that all these books passed *sub silentio*; but that one cannot shew any case, where it was adjudged, that such a release would be to the use of the releasee; and that there are books, where the pleading is, to shew the consideration or use. 2 *Saund. 11, 277. 2 Ventr. 120. Co. Entr. 264, 220, 474.* and the reason of the law as aforesaid is agreeable. As to the objection made by the defendant in error's counsel, that in this case it was sufficiently averred, that this release was to the use of the releasee, because it is said, that *virtute cujus* he was seised, &c. And for this *Dyer 254. b. Cro. Eliz. 678. Cro. Car. 221. W. Jones 245. Cro. Ja. 549. 2 Roll. Rep. 466. 3 Co. 44.* were cited where it is held, that an averment with *virtute cujus* is sufficient. It was answered, that this was a conclusion without premisses, or upon premisses that will not warrant such a conclusion; and therefore it will not avail. And as to the cases cited, they were

(a) Vide Dougl.

25.
(b) Vide 9 Co.
11. a.

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2 Mod. 252.

were for the most part after verdict, which aids many defects. Another objection urged by the counsel of the other side was, that this release enured by way of enlargement for the lease for a year, and therefore would participate of the consideration of it, and that the lease and release made but one conveyance. But to that it was answered, that the lease and release made but one conveyance as to the passing of the fee; but that they were in truth distinct conveyances, and had different operations, the one by the statute of 27 H. 8. the other by the common law. And as to what is said, that the release enures by way of enlargement of the estate of the lessee; it is true, that it gives him a greater estate than he had before, but that notwithstanding it destroyed the estate for years by merger; and it cannot participate of the consideration contained in the lease, which is perfectly distinct. And the counsel for the plaintiff in error relied much upon the case in 3 *Levinz* 233. *Edwards v. Morgan*, where in covenant brought by the assignee of the reversion against the lessee, judgment was staid, because the plaintiff did not make mention in his declaration to whose use the grant of the reversion was, nor the consideration of the grant; which case seems to be in point. *Sed non allocatur*. For per *Holt* chief justice, before the statute of 27 H. 8. c. 10. such pleading as in this case had doubtless been good, and the statute has not altered the way of pleading; but since the said statute, pleading of a feoffment, without shewing the use or the consideration, with an averment *virtute cuius*, &c. has been held good. *Plowd.* 478. And the reason is, because though no use or consideration is shewn in pleading of the feoffment, it does not follow from thence that such feoffment will be to the use of the feoffor; for that is matter of fact extrinsecal from the deed, which might have been declared by parol before the statute of 29 Car. 2. c. 3. and now by writing, though it be not a deed; and therefore if it was made to the use of the feoffor, it ought to be averred accordingly. But it would be hard, that the judges should construe such a feoffment, or the release in this case, to the use of the feoffor or releasor, where it does not appear; but if they were made to such use, it ought to be shewn on their side; and until that be shewn, they must be intended to be made to the use of the feoffee and releasee; especially since the statute of 27 Hen. 8. for now if a feoffment or release should not be intended to be to the use of the feoffee or releasee, they would be vain and to no purpose; for according to the case *Rolls v. Osborn*, *Hob.* 20. he (a) would have his old estate, and the warranty would remain; and if the lands were of the part of the mother, they continue so. And therefore the reason of such feoffments and releases differs much from what they were before the 27 Hen. 8. for then there might be some reason to continue the use to remain in the feoffor, &c. because notwithstanding

(a) Vide 2 Will.
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ing that, it was to some purpose, *viz.* to defraud the lord of his guardianship, or to conceal the tenancy of the freehold, &c. The case in *Co. Lit.* 23. is only, that where a man makes a feoffment without valuable consideration to divers particular uses, so much of the use, as he makes no disposition of, remains in him; and that is reasonable, because the reason of the making of the feoffment appears, *viz.* the raising of the particular uses. But in this case no reason of the making of the release appears, if it was not to the use of the releasee; and therefore it must be to the use of the releasee, till the contrary appears. But he agreed, that if particular uses had been limited upon the release, all the other uses, that had not been limited, would be to the use of the releasor, according to *Co. Litt.* 23. All the other judges agreed with *Holt* chief justice. And *Gould* justice said, that in the case of *Reynoldson v. Blake*, in *C. B. Pasch. 9 Will. 3.* [See 3 *Salk* 25. 40. ante 192.] the grant of a rectory was pleaded without averment of the consideration or use; and adjudged, that it was well enough, the exception being taken by himself. Like the case of a confirmation of a rent-service to the tenant for life of it, to hold to him and to his heirs; by this a fee passes to the tenant for life. *Littl. sect.* 549. *Vaugh.* 44.

Another error was assigned in this, that the plaintiff in the original action has declared, that he by virtue of the indentures of bargain and sale and release, and by virtue of the statute of *Hen. 8.* for transferring uses into possession, was seised, &c. whereas the release does not operate by virtue of the statute of uses, but by the common law; and therefore it is informal at least, and the defendant has demurred specially for want of form. *Sed non allocatur.* For though it is informal, yet the demurrer is general. For it is not enough, to say, *quod caret forma*; but the particular want of form must be shewn. Want of a writ of inquiry was also assigned for error; but upon diminution alledged, a writ of inquiry was returned. And *Mr. Raymond* assigned for error, 1. That the writ of inquiry could not be the writ of inquiry in this action, because the writ of inquiry recited all the facts in the present tense, *viz.* that the rent *adhuc insolutus existit*, and the tenements *adhuc* are out of repair; whereas the action of covenant is only for rent in arrear, and tenements not repaired, at the time of the original sued: but this *adhuc* in the writ of inquiry refers to the time of the *teste* of the writ of inquiry. 2. The plaintiff ought to recover only for the damages that he hath sustained at the time of the action brought; but here the jury upon the writ of inquiry have given damages that the plaintiff sustained after the bringing of the action, *viz.* until the writ of inquiry sued, which is erroneous. 2 *Saund.* 169. *Hambleton v. Vere*; *Hob.* 189. *Harbin v. Green*; *Trin. 9 W. 3.*
B. R.

B. R. Prince v. Moulton [See before 248.] But it was answered by the chief justice, 1. That the writ of inquiry recited the declaration *in hæc verba*, which was well enough. 2. That it was no like the cases cited, where more damages were given than ought to have been given; because the jury in this case ought to give so much in damages as would repair the tenements, and put them into such condition as they ought to be in, and damages also for the rent; and therefore if the tenements were become in a worse condition since the action brought, they ought to give damages for them. And the judgment was affirmed by the whole court.

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Watts *vers.* Rosewell.

Intr. Trin. 1 Ann.
B. R. Rot. 125.

S. C. 7 Mod. 53. Salk. 274.

DEBT upon bond. The defendant pleaded, that he delivered it to J. S. as an *escrow*, to be delivered to the plaintiff upon conditions to be performed by the plaintiff, which were not performed by him, *et sic, et sic non est factum; et hoc paratus est verificare*. The plaintiff demurs specially, and shews the cause of it to be, because the defendant has not aptly concluded his plea. And it was urged, that the plea ought to have concluded to the country, it being an express negative to the declaration. 1 *Ventr.* 210. *E. contra* 3 *Keb.* 142. *Manning v. Bucknall.* Intr. Hil. 24 & 25 *Car.* 2. *B. R. Rot.* 1035. was cited by Mr. Raymond, where it was held, that such plea might conclude the one way or the other. But *absente Holt* chief justice, the whole court gave judgment for the plaintiff, holding that such a plea ought to conclude to the country.

In an action on a deed, a plea that it was delivered as an escrow ought to conclude to the country. R. acc. ante 787.

Note, That no judgment was entred upon the roll in the case of *Manning v. Bucknall*. And Mr. Lutwyche told me, that his father and serjeant Girdler (who were counsel in the said case) remembered it, and said, that judgment was given for the plaintiff there afterwards, the court being upon the first motion of the said case of opinion as reported in 3 *Keb.* but afterwards changing it.

The same judgment the same term between *Bedell & Tempest.* Intr. Trin. 1 Ann. B. R. Rot. 64. in which *Chesbire* was counsel for the plaintiff, and *Raymond* for the defendant.

Regina *vers.* Sir John Bucknall. See before 792.

AN information was exhibited against the defendant for not repairing a bridge; and it was alleged in the information, that the defendant ought to repair the bridge, *quod ipse nunc est et per diversos annos ultimo elapsos fuit dominus manerii de B. &c.* Upon not guilty pleaded, it was tried before *Holt* chief justice at *Hertford*, last summer assizes where a verdict was given for the queen. And now Mr. *Broderick* moved in arrest of judgment, that it does not sufficiently appear by this information, that the defendant is obliged to repair this bridge; for regularly the county ought to repair the publick bridges; and no man shall be charged with the reparation of them, except *ratione tenuræ* or by prescription; and therefore it ought to have been shewn here, by which of these two means the defendant became chargeable with these repairs. And he cited *Noy* 93. *Latch* 206. *Stile* 108. *Sir H. Spiller's case*, and 400. And at the assizes, as also upon the first motion here, *Holt* chief justice said, that this amounted to a *ratione tenuræ*. But judgment was stayed *quousque*, &c. But afterwards at another day, Mr. *Williams* moved for judgment for the queen, *Holt* chief justice *mutata opinione*, said, that although the defendant was lord of the manor, yet that was no reason, that he should repair the bridge; but some particular charge ought to be shewn, as *ratione tenuræ*, or by prescription. And in such case, where a man is obliged to repair a bridge, his tenant for years being in possession will be obliged to do it; and if he fail, he will be indictable for it. But he said, that where a man is obliged to make fences against another, it is enough to say, *omnes occupatores* ought to repair, &c. because that lays a charge upon the right of another, which it may be, he cannot particularly know. See *Cro. Ja.* 665. *Holbatch v. Warner*. All the other judges were of the same opinion, and judgment was arrested.

If a man who is bound to repair a bridge *ratione tenuræ* of certain lands lets the lands, his lessee will be bound to repair the bridge. S. P. 7 Mod. 55. vide post 856.

Intr. Trin. 1 Ann. B.R. Rot. 360.

In an action on a recognizance of bail in B. R. 'tis sufficient to aver that the principal did not surrender himself to the marshal of the marshalsea of the king, without adding the words *before the king himself*. S. C. Salk. 439. 3 Salk. 320. R. acc. post 1174. Particularly if it is alleged that he did not render himself "on that occasion." In such an action a plea that no *copias ad satisfaciendum* issued against the principal cannot conclude to the country. Vide 2 Will. 66. Cowp. 577. Dougl. 60. 2 Tr. 576.

Snow vers. manucaptors Firebrass.

IN a *scire facias* against the defendants upon their recognizance, &c. the writ of *scire facias* in assigning the breach said, that *Firebrass* did not render himself *prisonæ mariscalii mariscalciæ dicti nuper regis*, and did not say, *coram ipso dicto nuper rege*, as the recognizance was, &c. And Mr. *King* for the defendants urged, that the breach

for

for this reason was not well assigned, for this marshal, mentioned in the breach, must be understood of the earl marshal of England, or of the king's household, and not of the king's bench; and the defendants were only bound, that *Firebrass* should render, &c. to the marshal of the king's bench; and therefore it does not appear that the condition of the recognizance was not performed. *Sed non allocatur.* For it was said, *ea occasione*; and *per curiam*, that will supply the want of the words, *coram ipso dicto nuper rege*, if they were necessary. But, *per curiam*, it would be a foreign intendment, to intend this of the marshal of the household, or of England. And therefore judgment was given for the plaintiff. Note, that the defendants pleaded, *no copias ad satisfaciendum*, and concluded to the country; the plaintiff demurred; and the plea was held ill by all for that reason. And *Holt* chief justice said, that the marshal of this court was part of the office of the earl marshal of England formerly, as appears by the book of 39 *Hen. 6.* 32 b. and that this office of this court was derived out of the other in the time king *James I.*

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The office of marshal of the king's bench was taken out of the office of marshal of England. D. acc. post. 1177.

Justin vers. Ballam.

S. C. Salk. 34. Suggestion. Salk. 742.

BALLAM libelled in the admiralty against a ship of Norway, for that she being in great distress for want of an anchor and cable, *Ballam* had contracted with the master of the said ship, and delivered them on board, &c. Upon which a motion was made in this court for a prohibition, to be directed to the judge of the admiralty, to prohibit him from proceeding in the said suit, upon a suggestion that the said contract was made upon the land, *viz.* at *Ratcliffe* upon the river *Thames*, the said ship then being in the said river *Thames* there. And a rule was made, that the defendant should shew cause, why a prohibition should not go. Upon which Mr. *Broderick* shewed for cause, 1. That of late times the admiralty had been always encouraged, and that they ought to have cognizance of all things incident to the navigation; therefore they shall have cognizance of a suit for mariners wages. 2. That in this case the defendant would be without remedy, if a prohibition should be granted; because the master of the ship, with whom the contract was made, was dead, and the part-owners were foreigners. 3. That the contract being upon the land will not hinder the admiralty to hold plea; as was held in the case of *Cassard v. Lewistie*; Comb. 135. *Holt.* 48. where a libel was in the admiralty against a ship upon an hypothecation made of her at land, and that appeared upon the instrument of hypothecation, which mentioned it to have been made at *Rotterdam*; and yet a prohibition was denied after great consideration. Now here though the anchor, &c. were sold upon the land, yet the stress of weather, which disabled

The master of a ship cannot hypothecate her except in the course of the voyage. D. acc. ante 578. 12 Mod. 406. Str. 695. vide ante 152. post. 982. and the cases there cited. Com. Admiralty B. 10. 2d Ed. vol. 1. p. 271. By the maritime law an hypothecation is implied upon every contract with the master of a ship.

By the law of England not.

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(a) Acc. ante
152. post 983.

disabled the ship; was upon the high sea; and therefore the original cause being within the jurisdiction of the admiralty, will draw the residue to it as incident. *Sed non allocatur.* For, *per curiam*, this is not like the case of *Coffard v. Lowstic*. 1. Because it does not appear in this case, that the ship was in her voyage, when she became in distress for want of an anchor, &c. and at the time of the contract. 2. There was no hypothecation here, as there was in the case cited; (a) now where there is an hypothecation, if the admiralty should be prohibited to proceed, &c. the party would be without remedy, for no suit can be against the ship at common law upon it. Now it is true, that by the maritime law every contract with the master of a ship implies an hypothecation; but it is otherwise by the law of England. Therefore this being a contract made with the master upon the land, it is the common case. The admiralty cannot have cognisance of such a suit. And therefore a prohibition was granted. But at the importunity of the defendant's counsel the court gave order, that the plaintiff should declare upon it, &c.

Withers *vers.* Harris.

S. C. 7 Mod. 50. Salk. 258. 3 Salk. 319. 3 Danv. Abr. 331. pl. 11. with some material difference, 7 Mod. 64. Holt, 265.

A *scire facias* lies upon a judgment in ejectment R. acc. Salk. 600. ante 669. & vide Com. Pleader. 3. l. 1. 2d Ed. vol. 5. p. 341. A writ of possession cannot in the general be sued out upon such a judgment after the expiration of a year from the time when the judgment was given. Semb. acc. Comb. 250. Skin. 427.

THE plaintiff recovered judgment in ejectment against the defendant; and after that a year after the judgment was expired, he sued an *habere facias possessionem*, and execution thereupon was executed. Upon which Mr. *Montague* moved that the said execution might be set aside as irregular, because the plaintiff could not sue execution upon the said judgment after a year after the judgment given, without a *scire facias*. Upon which a day was given to hear counsel of both sides. And at the day Mr. *Pierre Williams* for the plaintiff urged, that the execution was regular. He admitted, that if the plaintiff would sue an execution for the damages after the year, he ought to sue a *scire facias*; or in such a case as this he might sue a *scire facias* if he pleased, but that it was not necessary to sue such a writ. He said he did not know, that before the time of *Charles II.* any *scire facias* had been brought upon a judgment in ejectment. And in 2 *Keb.* 55. 1 *Sid.* 317. it was looked upon as a new case. That the law would not permit any man, who had recovered a right, to be without remedy; therefore a *scire facias* lay upon judgments in real actions after the year, and debt in personal actions; and by the statute of *Westm.* 2. 13 *Edw.* 1. c. 45. a *scire facias* was given upon recovery in personal actions; but at common law the plaintiff had no remedy after the year upon a judgment in ejectment, unless he might sue execution; because no *scire facias* lay, it not being a real action; which would be such an inconvenience, as the common law would not have permitted; therefore of necessity the plaintiff

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iff might sue execution after the year at common law. And if he might, then he may do it at this day; because no statute deprives him of the said remedy. That the reason why a *scire facias* lay upon a recovery in a real action at common law was to the end that the tenant might have an opportunity to shew his right, without being driven to a higher action: but such reason does not hold place in case of an ejectment, because by recovery in such action the possession is only recovered, and the defendant is not driven to a higher action, but may have another ejectment, and try it the next assizes. He urged farther, that ejectments are favoured by the law, and would lie of things, of which a real action would not lie, as *de cottagio, pomario, &c. Cro. Eliz.* 818, 854. *Stile* 215. That it could be no inconvenience, to allow of such execution without a *scire facias*: but it would be very inconvenient of the other side, to drive the recoveror in ejectment to a *scire facias* after the year after the judgment, because it is usual in mortgages to have judgment confessed in ejectment by the mortgagor to the mortgagee; and if in such case the mortgagee after the year should be driven to a *scire facias*; he would be in no better condition, than if he were driven to sue an ejectment originally. That in this case the plaintiff might have entered without suing an *habere facias possessionem*; for where the land recovered is certain, the recoveror may enter at his own peril, and the assistance of the sheriff is only to preserve the peace. 2 *Sid.* 156. 1 *Roll. Rep.* 213. *Noy* 71. *Palm.* 263. therefore that the suing of it will not vitiate. And lastly, he relied upon 1 *Sid.* 351. 2 *Keb.* 307. *Okey v. Vicars*, as a case in point, that a *scire facias* need not be sued after the year after judgment in ejectment. *Sed non allocatur per curiam*. For (by them) as to the possession an ejectment is in nature of a real action at common law, and therefore by common law a *scire facias* would lie upon a judgment in it. This was the proper remedy by common law for a termor for years to recover his term, and such a recovery bound him who had the inheritance, and he and his heirs could not falsify it no more than a recovery in a real action. Now there is the same reason therefore, that a *scire facias* should lie after the year upon a judgment in ejectment, as upon a recovery in a real action. And *Holt* chief justice said, that perhaps if the recoveror was delayed of his execution, by suing of a writ of error, that might alter the case: For if the defendant brings error after the year after judgment given, and afterwards become nonsuit, the (a) defendant in error may sue out execution without a *scire facias*. [See *Cro. Eliz.* 706, 7, 416. *Cro. Jac.* 364. 1 *Roll. Abr.* 889. 5 *Co.* 88. *Garnon's* case.] And that is an answer to the case of *Okey v. Vicars*.

(a) D. acc. 6 Mod. 288. Str. 301, & vide Barr. 660, 6 Mod. 288, 3 P. Wms. 36.

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Scire facias lay upon judgments in personal actions at common law, S. C. Salk. 600.

If one of several plaintiffs or defendants dies, execution may be sued by or against the survivors. S. P. 3 Danv. Abr. 332, pl. 6. R. acc. ante, 244. and see the cases there cited. But if a sole defendant dies, no execution can be sued without a *scire facias* in personal action. R. acc. ante 244. and vide the cases there cited. And Q. whether it can in an ejectment. Plaintiff may enter pending the writ of error upon the judgment in ejectment. vide 3. T. R. 293. 294.

And he said, that he was not at all satisfied with the opinion of *Coke*, 2 *Inst.* 469. in his comment upon *Westm.* 2. 13 *Ed.* 1. cap. 45. that no *scire facias* lay upon judgments in personal actions at common law: for the general words, *five alia quaecunque irrotulata, &c.* following, *conventiones, recognitiones, &c.* cannot be understood of judgments, according to his own rule of construction, 2 *Co.* 46. b. since judgments are of a superior nature to what was mentioned before. But *Powell* justice said, that all the books warrant *Coke's* opinion, and the constant opinion of all the judges since, viz. that no *scire facias* lay upon judgments in personal actions before *Westm.* 2. 13 *Ed.* 1. c. 45. And yet he himself said, that a *scire facias* lay upon a judgment in annuity after the year at common law. [*Ideo quare*, for the said assertion fortifies the opinion of the chief justice *Holt*.] *Holt* chief justice said farther, that the reason why *scire facias's* were rarely sued in such case is, because the plaintiff generally sues execution immediately. Where there are several plaintiffs or defendants, and one of them dies, execution may be sued by or against the survivors, upon suggestion of the death made upon the roll. But where there is but one defendant, and he dies, it is a question, whether execution may be sued without a *scire facias*. In personal actions doubtless it cannot, because a new person will be charged. But in ejectment the plaintiff ought to have execution only of the land recovered. *Shelley's* case, 2 *Co.* 93. will not warrant it; because there the death was the same day, that the *habere facias seisinam* bore *teste*, and so it was held to be a death after the *teste*. He said farther, that it was held in this court in the case of *Badger v. Loyd*, *Holt*, 199. that the plaintiff might enter pending the writ of error upon the judgment in ejectment, if he could find the possession empty; for the writ of error binds the court, but not the right of the party. But he must take care, that he do not enter with force. They all held, that the (a) *scire facias* ought to have been against the defendant and terretenants also; but that this might have been made good, by (b) suing of an *habere facias possessionem* within the year, and by an entry of *vicecomes non misit breve*; and therefore that is a means for mortgagees who have judgment in ejectment acknowledged to them; though *Holt* chief justice said, that it was a usurer's trick, and not to be encouraged. And *Powell* justice said, in the case in *C. B.* of lady *Allison*, it was held, that the mortgagee, who had a judgment confessed to him of the lands mortgaged in ejectment, could not sue an *habere facias possessionem* after the year after the judgment, but might prevent any inconvenience, by suing of an *habere facias possessionem*, and by entry of a *vicecomes non misit breve*. The execution was set aside as irregular, and restitution granted.

(a) Vide ante 669. (b) Vide Str. 100.

Gallifand *vers.* Rigaud.Intr. Trin. 1
Ann. B. R.
Rot. 121.

S. C. Salk. 552. Holt 597. more at large, 7 Mod. 78.

IN an attachment upon a prohibition the case was thus. The defendant libelled against the plaintiff in the ecclesiastical court, for having solicited the chastity of a woman, after the plaintiff had been indicted for an assault upon the same woman with intent to ravish her, and convicted and fined upon it, and after that the woman had sued an action of assault and battery against him for the same offence, which action was depending at the same time that the prosecution was in the spiritual court. All this matter appeared upon the pleadings; and the question was, whether the prohibition should stand, or whether a consultation should be granted. And Mr. *Montague* argued, that a consultation ought to be granted, because the solicitation of the chastity of a woman was properly of ecclesiastical cognizance. 2 *Inst.* 488. Then though the defendant be convicted upon an indictment, and though an action depends for the same cause, yet it is no cause of prohibition. 1. Because the spiritual and temporal courts in some cases have concurrent jurisdiction, as in (a) cases of pensions claimed by prescription, &c. 2. They proceed *diversis rationibus*, the one for punishing by fine, or giving damages, &c. the other *pro salute animæ*. That this difference is observed in *Artic. Cler.* 9 *Ed.* 2. *st.* 1. c. 6. and is confirmed by the common case of having laid violent hands upon a clerk.

E contra, it was argued by Mr. *Eyre*, that the prohibition ought to stand. Of which opinion the whole court seemed to be, because though the solicitation, &c. was of ecclesiastical cognizance, yet the force added to it, which is temporal, makes it cognisable by the temporal courts. As if *A.* calls *B.* whore and thief, the action shall be sued at common law, and *B.* cannot libel against *A.* in the spiritual court for the word whore, and have an action at common law for the word thief. See 2 *Roll. Abr.* 295. It is also one continued act, and therefore not *mere spiritualia*. 2 *Inst.* 488. *Coke* says, *mere spiritualia sunt quæ non habent mixturam temporalium*. As to the cases cited, where notwithstanding a recovery by the husband in trespass and assault upon his wife, &c. yet the spiritual court proceeded to punish the man for adultery; they are not to this purpose, because in the said case for the adultery there could not be a prosecution at common law: and in the said cases the husband and wife could not join in an action of trespass. And *Holt* chief justice said, that the

A man cannot be sued in the spiritual court for (a) citing a woman's chastity if the solicitation was accompanied with force, vide 2 *Inst.* 487. 488. & post 1101. At least he cannot after conviction on an indictment for assaulting her with intent to ravish her, if the assault and solicitation were at the same time.

(a) vide Com. Prohibition. G. 11. 2d Ed. vol. 4. p. 505, 506.

If a man calls a woman whore and thief, she cannot sue him in the spiritual court for the word whore, and in a temporal one for the word thief.

Vide *W. Jon.* 44. 12 Mod. 241. 248. Vin. Prohibition N. 25. Vol. 17. p. 595. D. acc. arg. post. 1101. Husband and wife cannot join in assault and battery for having assaulted the wife and ravished her. See post 1031.

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v.
RIGAUD.

usual way of declaring in the said actions for having defiled a man's wife, is not so good; and as some of the said declarations have been, it might have been a question, whether they had been good, though it is a trespass *quoad* the husband; but the proper action is, *quare uxorem suam rapuit*. *Rast. Trespass* 662. 6. And Powell justice said, that the present case was like the case of the abbot of *St. Alban's* in 22 *Edw. 4.* 20, cited 4 *Co.* 20. a. where the solicitation of chastity, being mixed with imprisonment and force, was become of temporal cognizance. But though the opinion of the court was as aforesaid, at the prayer of the defendant's counsel they gave order, that this case should be argued by civilians. But afterwards an apparent fault being in the pleadings, they refused to hear the civilians. And judgment therefore was given, that the prohibition should stand.

Greenway *vers.* Freeman.

S. C. 7 Mod. 83.

R. acc. 7 Mod.
96. Semb. cont.
ante 764.

DE B T upon judgment. The defendant pleaded a composition made with two thirds of his real creditors, &c. and the act of parliament, 8 and 9. *W. 3. c.* 18. and in his plea he avers, that he *se ab usuali loco commorantiae suae* such a day *subtraxit et abscondidit*, being unable to pay his debts, but does not say that he absconded for debt. And for this fault judgment was given for the plaintiff, as it had been before in a case in this court between *Southouse* and *Rutter*.

East *vers.* Effington.

S. C. 7 Mod. 86. Salk. 130.

Vide Carth. 509.
Str. 14. Bayley
60 and ante 175.

CA S E upon a bill of exchange. The plaintiff declared upon the custom of merchants, upon a bill directed to the defendant in this manner: Pray pay this my first bill of exchange, the second and third not being paid; and then he shews, that the bill was indorsed by the drawee to himself in this manner: *viz.* that the drawee *indorsavit super billam illam contenta billae illius fors solvenda* to the plaintiff, &c. Upon *non assumpsit* pleaded, verdict for the plaintiff. And Mr. Lee for the defendant moved in arrest of judgment. 1. That it is not averred, that the second and third bills were not paid; and without that the plaintiff is not entitled to his action, for if the second or third was paid, the defendant is not bound to pay this bill; and the nonpayment is *quasi* a condition precedent, which ought to entitle the plaintiff to this action; and therefore it ought to be averred. *Sed non allocatur*. For, *per curiam*, though it had been ill upon demurrer, yet it is aided by the verdict; for

for if the second or third had been paid, the jury would have found *non assumpsit* here. 2. A second exception was, that the indorsement shewn in the declaration is not such as will transfer the property of the bill, and therefore the plaintiff is not intitled to this action. *Sed non allocatur*. For, *per curiam*, it is aided by verdict; as want of attornment in debt for rent by the assignee of the reversion, is aided by verdict. And judgment was given for the plaintiff, Mr. King for the plaintiff.

EAST
v.
ESSINGTON;

Nicholls *vers.* Tirrett.

S. C. 7 Mod. 96.

DEBT upon bond. The defendant pleaded the act of composition, 8 and 9 W. 3. c. 18. &c. Exception was taken to the plea, that the defendant only says, that he absconded the seventeenth of November 1696, and does not say, that he absconded at the time of the making of the act. For the seventeenth of November extends only to the being a prisoner for debt, but the absconding ought to be at the time of the act, &c. And for this reason the plea was held ill, and judgment for the plaintiff. *Ex relatione m'ri Jacob*. The same point was resolved Trin. 2 Ann. B. R. between *Cousins and Calkutt*, after consideration had by the court of the different penning of the act. Mr. *Salkeid* counsel with the plaintiff, Mr. *Brantwaite* with the defendant.

Henry *vers.* Cole.

S. C. 7 Mod. 103.

UPON issue joined in an action, the writ of *nisi prius* was awarded in the name of the king, and then entry was made upon the record, that before the day in bank the king died; and at the day in bank the writ is returned by the justices of the queen. And Mr. *Ward* moved, that it did not appear, that the king died before the day of *nisi prius*; and if not, the execution of the writ by the justices of the queen was erroneous. *Sed non allocatur*. For, *per curiam*, they will take notice on what day the king died, which was the eighth of March, and consequently before the twenty-seventh of April, which was the day of *nisi prius*. And therefore the execution of the writ by the justices of the queen good. And judgment was given for the plaintiff. See the late act of parliament, 1 Ann. c. 8. s. 3.

The courts will
take notice on
what day a king
dies.

How *vers.* Prinne.

S. C. More at large. 7 Mod. 107.

"Tis actionable to say of one who is a justice a deputy lieutenant of a county and a candidate for a seat in parliament, "he is a Jacobite, and for bringing in the Prince of Wales, and popery, to the destroying of our nation." S. C. Salk. 694. Holt 652. or to say of a privy councillor he arrested me because I would not give my consent to him to bring in popery and the Prince of Wales. The words "bringing in" shall be intended to mean bringing into England, S. C. Salk. 694. and the words "the Prince of Wales," the pretended prince, S. C. Salk. 694.

(b) Vide Bull. Nisi Pri. 4.

CASE for words. The plaintiff declared, that he was a justice of peace, and deputy lieutenant for the county of Gloucester, and that he had been representative of the said county in parliament, and then was candidate to be chosen knight of the said shire, &c. that the defendant intending to defame him, and to hinder him from being elected, said to J. S. in the hearing of divers freeholders of the said county: "Don't you give your vote for Mr. How for he is a Jacobite, and is for bringing in the prince of Wales (a) and popery, to the destroying our nation;" then he lays another count, averring himself to be a privy councillor, &c. and that the defendant said of him, &c. "I have been arrested this morning at the suit of the honourable John How esquire, and it has cost me five shillings and sixpence for my breakfast, and if you do not vote for him, he will serve you so too; I know why it is, it is because I would not give my consent to him, to bring in popery and the prince of Wales." Not guilty pleaded. Verdict for the plaintiff, and 400 l. damages. Upon which Messieurs Mountague, Weld, Parker, and Lechmere, moved in arrest of judgment, that the words were not actionable. And it was argued on the other side for the plaintiff by Mr. solicitor general Harcourt, Mr. Groves, and Mr. Bannister. And this day, the twenty-seventh of November, Holt chief justice pronounced the opinion of the court to be, that they were actionable, being spoken of a man, who enjoyed such offices, &c. But they would not determine, whether they would have been actionable or not, being spoken of a private man. And the principal reasons of their judgment were, 1. That they ought to intend the words bringing in, to be understood of bringing into England, being spoken by an Englishman (for every man shall be intended here to be an Englishman, if the contrary does not appear. 5 Co. 7 b. Cawdry's case) and especially the words, to the destroying of our nation, being added. 2. That it is notorious, who was meant by the words, prince of Wales, for the law took notice, that there was a pretended prince of Wales, as appears by the 7 & 8 Will. 3. cap. 15. which enacts, that the asserting, that the pretended prince of Wales hath any right to the crown of England, shall be a *præmunire*. Then (b) these words being spoken of a justice of the peace, &c. will be actionable; because they charge him, with maintaining such principles, as such an officer ought not to have, and for which he ought to be discharged from his office. 3 Lev. 50. Raym. 482. Sir Thomas Clarges v. Rowe, a case strong in point. Cro. El. 191. 1 Leon. 335. Cro. Ja. 202. Yelv. 104.

(a) According to the report in 7 Mod. 107. an innuendo was added implying that the pretended prince of Wales was meant.

Objection.

Objection. That the words may be understood, that Mr. *How* would bring in popery and the pretender by act of parliament, which was lawful; and then to say so, did not import any scandal.

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v.
PRINNE.

Answer. That is too foreign an intendment.

Objection. That the words do not charge M. *How* with the doing of any act.

Answer. No act was charged to have been done in the cases cited in 3 *Lev.* 50. and *Cro. El.* 191. and yet they were held actionable. And words will be actionable, if they charge men with evil inclinations and principles. 1 *Brownl.* 5. He will play off both sides. 1 *Roll. Abr.* 86. He will cut him out of doors.

Objection. That these offices are not offices of profit, &c.

Answer. Yet if the words spoken charge such an officer criminally, they will be actionable; otherwise if they only import ignorance. 1 *Lev.* 52. *Bill v. Field.* But farther these words do more than charge the plaintiff with evil principles only: for one must presume, that he who heard Mr. *Prinne* speak these words, would presume, that he knew the matter charged, by some discourse, or overt act, of Mr. *How's*; how otherwise could Mr. *Prinne* know Mr. *How's* inclinations? And such overt-act would be criminal, and the words importing it actionable. And upon this consideration perhaps the words would bear an action in the case of a private man. The same reason will maintain the action for the words in the second count. And therefore judgment by the whole court was entered for the plaintiff.

Afterwards error was brought upon this judgment in parliament, and exception taken, that the verdict was ill found, because he was found guilty *quoad* the words *primo et sexto mentionata*. And after long debates at several days, judgment was affirmed by forty-eight lords against thirty four, Monday January 29, 1704. 1 *Bro. Parl. Cas.* 97.

I ntr. Hill. 13
Will. 3. B. R.
Rot. 438.

If a man cove-
nants to pay a
sum of money
and binds him-
self in the penal-
ty of a less sum
for performance,
he may be sued
for the larger
sum in case of
non-payment,
vide Burr. 2228.

Debt will be lia-
ble upon a cove-
nant to pay mo-
ney, if the quan-
tum is ascertained
at the time of
bringing the
action, tho' it
was uncertain
when the cove-
nant was made.
S. C. Salk. 658.
Holt 200. 7
Mod. 87. R.
acc. Str. 1089.
vide Dougl. 6.
under a cove-
nant to pay so
much for every
hundred of par-
ticular articles,
the party is not
liable to pay for
a less quantity
than a hundred.
S. C. Salk. 658.
Holt. 200. 7
Mod. 87.

But in action of
debt upon the
covenant tho'
the plaintiff
claims an in-
tire sum for so
many hundreds,
and the part of
a hundred, he
may enter a re-
mittitur as to
the sum claimed
in respect of the
part. S. C.
Salk. 658. Holt
200. 7 Mod. 87.
vide Com. 525.
Dougl. 6. 1. H.
B. C. 249. Burr. 2231. an action may be maintained upon a covenant to pay for all the stacks of
wood in a certain place upon tale, though the plaintiff never told the stacks, or that the defen-
dant never had them.

Ingledeu *vers.* Cripps.

DE B T. The plaintiff declared upon a bill penal,
sealed and delivered by the plaintiff to the defendant,
reciting, that whereas the plaintiff had agreed with the
defendant to sell to him so many stacks of wood, the de-
fendant for that covenanted to pay to the plaintiff 35 *l.* for
every hundred of the said stacks; and bound himself in the
penalty of 100 *l.* to do it; then the plaintiff shews, that
there was so many stacks, &c. and brings his action for
310 *l.* &c. as the total for all the said stacks. The defen-
dant demurred. And it was objected by Mr. *Branthwaite*
for the defendant, 1. That since there is a penalty of 100 *l.*
in the bill, the plaintiff cannot have an action for more
than the 100 *l.* *Sed non allocatur.* For *per Holt* chief
justice the plaintiff has election, to sue for the penalty, or
for the rate agreed, although it be more than the penalty.
And he may sue for the 310 *l.* &c. for the wood, and for
the 100 *l.* penalty also. For this penalty was only in-
serted, to enforce the payment for the wood. And it
cannot be intended, that if the plaintiff sold wood to the
value of 1000 *l.* he should be content with the penalty only.
2. It was objected for the defendant, that admitting that
the plaintiff might sue for the wood sold, yet he ought to
have covenant and not an action of debt, because the duty
was not certain, for the agreement, is to pay so much for
every hundred stacks that should be in such a place, and it
altogether uncertain how many hundred stacks were there.
Sed non allocatur. For, *per curiam*, the plaintiff may have debt or
covenant at his election. For the rate being certain, *viz.* 35 *l.*
for every hundred stacks of wood; when the defendant has the
wood, the agreement becomes certain, for which debt lies. 3.
A third exception was, that the plaintiff has demanded
more than as appeared by his own shewing could be de-
manded; because he demands so much for fifty stacks, and
the agreement is only, that the plaintiff should be paid for
every hundred stacks; otherwise it had been, if the agree-
ment had been, that the defendant should pay *secundum ra-
tam* of 35 *l.* for every hundred, &c. *Alley* 9. *Stile* 12.
Needler v. Guest. 2 *Lev.* 124. *Rea v. Burnis*, in points
E contra it was argued by Mr. *Acherley* for the plaintiff,
that this covenant or agreement ought to be construed ac-
cording to the intent of the makers of it; and it could not
be imagined, that the plaintiff intended to give fifty stacks
of wood for nothing. And he cited 1 *Lev.* 140. *Keyme v.*
Goulston. *Sed non allocatur.* For, *per curiam*, the agree-

ment is only for every hundred ; and since it is not said *secundum ratam*, the plaintiff cannot recover any thing for it by this agreement. 4. A fourth exception taken by the defendant was, that the agreement is, that the defendant shall have liberty to take the wood in such a place, and that he shall pay 35 l. for every hundred stacks upon tale ; and the plaintiff has not averred, that the defendant had all the hundred stacks, for which this action is brought ; but the plaintiff has only averred, that they were all at the place, &c. at the time of the articles made. Now 1. It was necessary to aver, that the defendant had the stacks, &c. because otherwise the defendant is not obliged to pay for them. For the agreement is, to pay for, &c. which is a condition precedent, which must be performed, before the plaintiff can be intitled to his action. 15 Hen. 7. 10. 1 Lev. 70. 2. The plaintiff ought to do the first act, viz. to tell them ; for the payment is to be made for every hundred stacks upon tale. *Sed non allocatur*. For per Holt chief justice, there is no condition precedent, nor first act to be done or performed by the plaintiff ; for he has sold all his interest in this wood, and the defendant may and ought to tell it. Then Mr. Acherly moved the court, that the plaintiff he might have leave to enter a *remittit* for the 17 l. 10 s. demanded, more than ought to be, for the fifty stacks ; and that he might have his judgment for the residue. And day was given to argue that. And Mr. Branthwaite for the defendant urged, that the plaintiff in this case could not enter a *remittit*. For the difference is, where the demand is intire, and where several. Where the demand is several, and part is well demanded, and part ill ; the plaintiff may have judgment for that which is well demanded ; and may be barred for the residue, as in *Hob. 178. Andrews v. De la Hay*, in an action of debt upon several bonds, one of which was not payable at the time of the action brought ; yet the plaintiff shall have judgment upon the rest. But where the demand is intire, an abridgment of it cannot be, neither can the plaintiff have judgment for part. *E contra* it was argued by Mr. Acherley for the plaintiff, that a *remittit* may be entered for the 17 l. 10 s. &c. and that the plaintiff shall have judgment for the rest. For (by him) where the money is certain and intire upon the face of the contract, the demand of more than is due is ill, and cannot be aided by the entry of a *remittit* ; but where the money recoverable is composed of several parcels ; there if the plaintiff demand more than is due, he may enter a *remittit* for the overplus ; for there he ought to recover that which he can prove to be due, and not according to his demand ; and therefore the plaintiff may as well waive that which is not due, by the entry of a *remittit*, as the jury may, it not being proved at the trial. And for that he cited *Cro. Ja. 498, 529. 1 Saund.*

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206. and the case of *Thwaites v. Lady Ashfield*, 12 Mod. 93. 5 Mod. 212. Comb. 365. intr. *Hil. 7 Will. 3. B. R. Rot.* 469. in debt for rent the plaintiff declared as assignee by virtue of a decree made by the commissioners at *Clifford's Inn* for the determination of differences about the fire of *London*, and the plaintiff demanded 8*l.* more than was due, as appeared by his declaration; the defendant pleaded *null tiel record*; which being for the plaintiff, the defendant brought a writ of error, and moved the court, that the plaintiff should not enter his judgment without leave of the court; and a rule was made accordingly; and afterwards a motion was made, to set aside that rule, and that the plaintiff might have leave to enter a *remittit* for the 8*l.* and have judgment for the rest; and the case of *Barber and Pomeroy*. 1 *Roll. Abr.* 785. *Stile* 175. was cited as a case in point; and though it is said in 1 *Saund.* 286. by *Hale* chief justice, that no judgment was entered in the said case, yet that was mistaken, as appears by the sight of the record, which was then brought into court; and the entry of it is *Hil. 24 Car. 1. B. R. Rot.* 951. and upon the said authority the plaintiff had leave given him, to enter a *remittit* for the 8*l.* which put an end to the writ of error; which case is in manner a case in point. And of that opinion was *Holt*, *Powell*, and *Powys*, justices. And they agreed the distinction taken by Mr. *Acherley*; for by *Holt*, the demand here is no more intire, than every action of debt for rent, or other thing; the demand is intire as to the action, but not as to the *lien*; and therefore the difference is, where upon a covenant to pay a sum certain debt is brought, the variance of the sum contained in the deed will vitiate; but where the deed relates to matter of fact, there though the plaintiff demand more than is due, he may enter a *remittit*. And the case of *Barber and Pomeroy* is full in point. But *Gould* justice *contra*, held that this was an intire contract, and therefore that a *remittit* could not be entered for part; no more than there can be an abridgment of an intire thing at common law. And he cited *Dier* 65. 10 *Hen. 6. 5 Yelv.* 66. That this differs from the case of *Barber and Pomeroy*, because the said case was after verdict; but here it would be hard, to take away the defendant's good cause of demurrer, which he had at the time when he demurred. But *per Holt* chief justice, the verdict makes such a case worse, for there the jury find the intanglement; and yet the court, seeing the verdict to be impossible, will give leave to enter a *remittit*. Judgment was given for the plaintiff for what was due, with leave to enter a *remittit* for the residue.

Regina *vers.* Dr. Thomas Watson formerly
Bishop of St. David's.

THE defendant was brought into the king's bench upon a *habeas corpus* directed to the sheriff of *Middlesex*; to which writ the sheriff made a long return, in which writ the *significavit* and *excommunicato capiendo* were shewn at large, by which it appeared, that the defendant was in custody of the sheriff, being arrested upon an *excommunicato capiendo*, being excommunicate for non-payment of costs, in which he was condemned by commissioners delegates in *quadam causa officii sive correctionis. ex promotione* — *Lucy, &c.* And the return of the *habeas corpus* being filed (though the defendant was informed that the *significavit* was bad, and that by exception taken to it he might be discharged) his counsel offered a plea ingrossed, and signed by counsel, that he long before, &c. and at the time of the, &c. and now, is *episcopus Menevensis*; that he was summoned to parliament, 7 Will. 3. and sat there as bishop, *prout patet per recordum; et petit iudicium, &c.* And the intent of this plea was, to have the judgment of the king's bench upon it, and upon the said judgment to bring a writ of error in parliament, where he hoped to have judgment in his favour as to the right of the bishoprick, of which he was deprived by the archbishop, &c. And therefore Mr. *Weld* and Mr. *Mountague* for the defendant said, that they insisted, that their plea should be received, and that they were ready to try it with the attorney general, whether the defendant was bishop or not; and that if he is bishop (as said they he is) then a *capias* will not lie against him, because he is a peer of parliament. But the court refused at first to receive the plea. 1. Because the defendant is not in *custodia mariscalii mariscalciae*, and therefore he cannot plead so, as he has here. 2. He has not made any conclusion to his plea, and therefore the court does not know, what judgment he desires, &c. 3. All the court held, that bishops are subject to be excommunicated, and if an *excommunicato capiendo* should not lie against them, there would be a judgment without a power of executing it, which is absurd. But afterwards the defendant amended his plea, and pleaded as in custody of the sheriff of *Middlesex*. And upon the importunity of the defendant's counsel, the plea was received, and a day given to the queen's attorney general to reply to it, or demur, as he should judge proper. At which day Mr. *Broderick* for the promoter *Lucy* urged, that the defendant ought to sue a *scire facias* against *Lucy*, because he has an interest in the costs. And he cited 2 Roll. Abr. 178. S. Cro. Car. 198. *Codrington v. Rodman*, that the pardon

A man brought up upon an *habeas corpus* by a sheriff in a plea to the return cannot be turned over to the custody of the marshal. S. C. 7 Mod. 56.

A plea to the return must pray some judgment.

A bishop may be excommunicated.

And an *excommunicato capiendo* lies against him.

A man brought up by *habeas corpus* after an arrest upon an *excommunicato capiendo* for nonpayment of costs may plead to the return without suing a *scire facias* against the person to whom the costs are payable. S. C. 7 Mod. 56.

The court will not consider such plea if the *significavit* appears insufficient.

A *significavit* upon an excommunication for nonpayment of costs must shew that those costs were adjudged in a cause of ecclesiastical cognizance. S. C. 7 Mod. 56. 117. Vide ante 323. Cro. Car. 196.

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there was by a general act of parliament, and therefore there was no need to sue a *scire facias* against the party that had recovered the costs in the spiritual court; but that it would be otherwise in case of a pardon by letters patent. But, *per curiam*, the defendant has no occasion to sue a *scire facias* against *Lucy*; for if a man be excommunicate for non-payment of tithes, and afterwards the queen pardons the contempt, though the parson has an interest in the tithes, yet if the defendant be afterwards arrested upon an *excommunicato capiendo*, he shall be discharged by this court upon pleading the pardon, being brought here by *habeas corpus*, without suing a *scire facias* against the parson. And that is a stronger case than this; because costs were allowed to *Lucy* here but as a promoter, and not as the original cause of the suit. But the attorney general not being ready for the queen, he prayed another day. And afterwards he came and declared to the court, that he would not intermeddle in the matter. Upon which the court said, that since it appeared to them, that the *significavit* was ill, because it did not appear, that these costs were adjudged in a cause of ecclesiastical consufance (for if it had been for costs alone, without doubt it had been ill) now the words in *causa officii sue correctionis* do not make it better; and it is plain since 51 E. 2. 23. f. 13. that the cause ought to appear in the writ; for how otherwise can this court make judgment of the nine causes, in order to award several processes with penalties? And *Fowler's case* [Salk. 293.] was cited, also a case between the king and *Hill*. Pasch. 13 Will. 3. Salk. 294. whereby the *significavit* it appeared, that *Hill* was excommunicate *propter manifestum contemptum in non solvendo octo libras cuidam J. S.* in which *Hill* was condemned in *quodam negotio concernente eruditionem puerorum absque licentia* of the bishop, &c. and the *excommunicato capiendo* was quashed, and a *supersedeas* granted, because it did not appear, that this matter was of ecclesiastical consufance; for it may be, *Hill* was a writing-master, which is not within any of the canons, nor compellable to take a licence of the bishop, but a mere temporal office; or tutor in the university, &c. The court quashed the writ of *excommunicato capiendo*, and discharged the defendant, and refused to take any notice of the plea.

Gibbons *vers.* Saunders.Intr. Hil. 13.
W. 3. Rot. 582.

ERROR. Debt upon a judgment given in debt before the mayor, &c. of the staple upon a bond. And upon error brought the error assigned was, 1. That it is not averred, that the parties were merchants at the time of the debt contracted; it is averred, that they were merchants at the time of the plaint levied; but that is not enough, for the statutes of 27 Ed. 3. c. 8. and 36 Ed. 3. c. 7. require that one of them at least shall be a merchant. 2. It does not appear, that the bond was given for a matter concerning merchandise. But the writ of error was quashed, because the writ was directed *majori aldermannis et vicem comitibus civitatis Bristol*, to remove the record of a judgment given upon a plaint levied before them; and the record removed was of a judgment given upon a plaint levied before the mayor and constables of the staple.

A writ of error to remove a judgment upon a plaint levied before the mayor, aldermen and sheriffs of a city, will not remove a judgment on a plaint before the mayor and constables of the staple. Vide Com. Pleader. 3 B. 13. 2d Ed. vol. 5. p. 298. 5 G. 1. c. 13. f. 1. and such a writ brought on such a judgment

shall be quashed. Vide 5 G. 1. c. 13. f. 1.

Tomkins *vers.* Pinfent.

DEBT for 14*l.* for rent. The plaintiff declared upon a demise made the twenty-fifth of August 11 Will. 3. of a messuage in St. John's Lane in Clerkenwell, *habendum et tenendum* to the defendant for seven years, *incipiend.* from the twenty-fourth day of June preceding, *reddendum* *proinde quarteriatum ad quatuor maxime usualia festa in anno seu infra viginti dies proxime post quodlibet dierum quatuor festorum summam trium librarum et decem solidorum, prima solutione inde fienda ad festum sancti Michaelis proxime sequens dimissionem illam, et sic deinceps in quolibet anno ad quarteriali festa usualia sequentia, viz. St. Thomas, Lady-day and Midsummer; et quod quatuor-decim libras de redditu prædicto pro uno anno integro finito the twenty-fourth of December anno 13 Will. 3. solubiles decimo Januarii sequente a retro fuerunt et insolutae et adhuc insolutae existunt, per quod actio accrevit* to the plaintiff to demand the said 14*l.* The defendant demurred generally. And Mr. Mompesson took exception, 1. That the rent is reserved payable at the four usual feasts, but the [*viz.*] contains but three, therefore that it is ill. But *per curiam*, the [*viz.*] being repugnant, shall be rejected as void. 2. A second exception was, that the year did not end the twenty-fourth of December, but the twenty-first; according to the *reddendum*, according to which the plaintiff ought to demand his rent in the action. And of this opinion, Holt, Powell, and Gould justices were. *Contra* Powys justice. And there-

A statement under a videlicet which is repugnant with what preceded, is void.

Upon lease for years from 24 June, rendering rent at Mich. St. Thomas, Lady day, and Midsummer, a demand of rent for a year ended on 24th Dec. is bad. S. C. Salk. 141. 7 Mod. 96.

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therefore judgment was given for the defendant. For where there are special days of payment limited upon the *reddendum*, the rent ought to be computed according to the *reddendum*, and not according to the *habendum*; but where the reservation is general, as half-yearly, or quarterly, and no special days are mentioned, there the half year, or quarter, must be computed according to the *habendum*.

Regina *vers.* Plint.

S. C. Salk. 144. pl. 4.

A *Certiorari* issued out of this court, to remove all convictions of the defendant, for having removed foreign salt, &c. without having a permit, &c. The order removed was, for removing of salt generally. And adjudged, that this order was not removed by the *certiorari*; and therefore the *certiorari* was quashed. *Ex motione m'ri attorn. gen. Northey.*

Regina *vers.* Gouch.

S. C. Salk. 441.

The sessions may make an order for the payment of money for husbandry work and labour in husbandry. Vide Burn. Servants, II. 7. 14th Ed. vol. 4. p. 125.

Norfolk, ss. **A**T the general quarter-sessions of the peace held the eighth of May 13 Will. 3. an order was made, upon complaint made to the justices there by *Nicholas Bone* of *Hoe* labourer against the said *Thomas Gouch*, that 2*l.* 2*s.* 4*d.* for husbandry works and labours in husbandry done by the said *Bone* for the said *Gouch*, besides other money, as by a bill thereof now in court produced and proved by the said *Bone*, are due to him; and that this court directed and required the said *Mr. Gouch*, present in court, to pay without farther trouble; but the said *Mr. Gouch* obstinately refused so to do; it is therefore ordered by this court, that the said *Thomas Gouch* do forthwith, upon demand and sight of this order, pay unto the said *Nicholas Bone* the sum of 2*l.* 2*s.* and 4*d.* for his said work and labours in husbandry without further trouble or delay at his peril. This order being removed into the king's bench by *certiorari*, *Mr. Peere Williams* moved to quash it, because the justices of peace have no jurisdiction over any wages due to servants, except in husbandry for persons bound according to the statute. Now it appears here, that this order is ill. But *e contra* it was urged by *Mr. Chesbire*, that the justices have jurisdiction; for the words of 5 *El. c. 4.* are general; and if it appears that the wages were due for labours in husbandry, though (a) it is not expressed so in the order, &c. As *Pasch. 1691. B. R.* *Gould* then serjeant moved to quash an order for payment of

(a) Vide Salk. 441. pl. 5. 484. pl. 40. sed vide etiam Str. 8. 475, 476.

of 2s. and 4d. for day labour and work done, because it was not said to be due in husbandry; but it was denied, because it appeared that it was done for husbandry; and that case was between the King and *Darner*. He cited also *T. Jones* 47, *Rex v. Deval*, and said, that though it was said here to be due for labours in husbandry, besides other money as by a bill now in court produced appears, he said, that he had the bill in his hand, and that there was nothing there but matters of husbandry. And he urged, that his client was poor, and the matters in question very small. And the order was confirmed by *Powell*, *Powys*, and *Gould* justices, *absente Holt* chief justice, after several motions.

REGINA
v.
GOUGH.

Atwood *vers.* Burr.

ERROR upon a judgment given in the court of *Maidstone* in *Kent* in a *scire facias* against the bail upon their recognizance there entered into in a cause between *Atwood* and *Drue*. Several errors were urged by the counsel for the plaintiff in error, the greatest part of which were over-ruled by the court. But when they saw the court inclined to affirm the judgment, they quashed the writ of error for some variance; and then the plaintiff in error sued out a new writ of error; and so he did for several times together, so that he sued eight writs of error. And now the counsel for the plaintiff in error, having received a rebuke from the court for these proceedings, insisted upon a new error, observed in the record first by the chief justice *Holt*; which was, that the first *scire facias* was not returned, but the entry was, that the serjeant at mace (to whom the precept in nature of a *scire facias* was directed) *non misit*, &c. and then an *alias* was awarded, &c. and so continuances were made; and at last the defendant appeared at a *scire feci* returned, and after imparlance demurred to the said *scire facias* because it was *minus sufficiens ad prædictum* the plaintiff *Atwood executionem suam versus prædictum* the defendant *habendum manutenendum*, &c. *et petit quod* the plaintiff *ab executione sua versus eum præcludatur*; the plaintiff joined in demurrer, and said that it was sufficient to have his execution, &c. and prayed it; and then the court gave judgment, *quod* the plaintiff *haberet executionem*. And the first error urged by the counsel was, that the first *scire facias* not being returned, it could not be continued, and so all the proceedings afterwards were void; for the writ not being returned, was totally lost. Against which it was argued by *Mr. Raymond*, that there was a difference between an original issuing out of chancery returnable in the king's bench or common pleas, and writs issuing out of the

Intr. Pasch. 13
W. 3. B. R.
Rot. 46.

A judicial writ must be returned before an alias can be sued out thereon. S. C. 7 Mod. 3. sed vide post 1142. 1252.

The judgment upon a demurrer must express in terms whether the thing demurred to was or was not good. S. C. 7 Mod. 3 Salk. 402.

A writ of error to remove the record, &c. of the award of the execution of a judgment on a *scire facias* against bail will not remove an award of execution on a recognizance. S. C. 7 Mod. 3. R. acc. ante 553. sed vide 5 G. 1. c. 13. f. 1.

Wherever a writ of error is quashed, the plaintiff is of course intitled to sue out another and so toties quoties. Vide Str. 880. 1015.

ATWOOD
v.
BURR.

Scire facias
heretofore were
always entered
upon the roll,
when they issued
out of this court.

the said courts, or other inferior courts, and returnable there; for in the first case, if the writ is not returned, it is lost, and the court in which it was returnable cannot proceed, because the cause is not depending before them; but *contra* where the writ is returnable in the same court from whence it issued, for there the party has a day by the roll, and may appear upon the day by the roll. 10 Hen. 7. 11. b. And he cited several precedents in this court, to prove, that heretofore writs of *scire facias* were always entered upon the roll. Hil. 23 Hen. 7. B. R. rot. 21, &c. And he cited 1 Roll. Rep. 329. Sir T. Middleton v. Twinio, to prove, that though the first *scire facias* is entered with a *vicecomes non misit breve*, yet the plaintiff may proceed and sue out another; for there the case was thus; judgment was entered against Twinio in an action, of debt in C. B. upon which error was brought, and the plaintiff in error found bail, who entered into recognizance, that he should prosecute the writ of error with effect: Sir T. Middleton sued a *scire facias* against the bail, to shew cause, why he should not have execution against them, and assigned a breach, in not prosecuting the writ of error with effect, because Twinio did not take out a writ of *scire facias ad audiendum errores*, when it was granted by the court, returnable *octabis Trinitatis*; the bail pleaded, *quod praeceptum fuit vicecomiti*, to warn the plaintiff in the original action, returnable *octabis Trinitatis*, and that afterwards Twinio appeared, *et vicecomes non misit breve*, and the plaintiff did not come, and that afterwards Twinio sued a *scire facias sicut alias*, returnable at a day certain; and there the second *scire facias* was admitted to be well sued, and yet the first writ was not returned; and there the party might plead to the *scire facias ad audiendum errores* as well as in this case, viz. a release, &c. and therefore he urged, that the said case was much to the purpose. And Gould justice at the first argument seemed to be of the same opinion. But afterwards in this term the whole court held, that since the first *scire facias* was not returned, an *alias scire facias* could not be sued; and therefore they inclined to reverse the judgment. And they looked upon the case in Rolle's reports as not tantamount to the case in question. Another error, upon which Mr. Broderick for the plaintiff in error insisted, was, that the judgment was erroneous, because it has not determined the matter referred to them by the parties, which was, whether the writ of *scire facias* was sufficient or not; but has, without determining that, awarded execution. And for this Ow. 19. Walter's case, Cro. Eliz. 227. Cro. Ja. 372. 1 Roll. Abr. 205. were cited. But to this Mr. Raymond answered, that the court has in effect determined the matter referred to them by the demurrer of the parties; for they have adjudged, that the plaintiff ought to have execution, which is a determination by consequence, that the writ of *scire facias* was

ATWOOD
v.
BURR.

was good; for if it was not good, the plaintiff could not have execution. But as to this point *Holt* chief justice seemed to be of opinion, that the judgment was erroneous; but he gave no positive opinion to this point; but for the other error, he was ready to reverse the judgment. Then Mr. *Raymond* took exception to the writ of error, and moved to quash it, because the writ of error was to remove *recordum et processum adjudicationis executionis judicii super prædictum præceptum de scire facias*, and the record removed was of an adjudication of execution *super recognitionem*. And for this variance the writ of error was quashed, notwithstanding that there were several precedents produced, to shew that the cursitors used to make writs of error upon judgments in *scire facias* against bail in that manner. For *per curiam*, there is a plain difference between an award of execution in a *scire facias* upon a judgment, and in a *scire facias* upon a recognizance. Then the defendant *Burr* sued another writ of error; upon which a motion was made in chancery to supersede it, *quia erronee emanavit*, upon suggestion, that the cursitors would certify, that no man could have more than three writs of error by the course of the court. Upon which a day was given to the plaintiff in error, to shew cause, &c. And the cursitors were ordered to attend. And upon hearing counsel of both sides, the lord keeper *Wright* declared, that a writ of error was a writ of right, and that he could not hinder the party from suing it. And therefore the order was discharged. *Post*. 1252.

Brook *vers.* Bishop.

S. C. Salk. 639. 3 Salk. 359. Holt 698.

TRespass. The plaintiff declared, that the defendant the second of April broke and entred the plaintiff's close, *et herbam suam pedibus ambulando conculeavit et consumpsit, necnon arbores suas, viz. decem populos, &c. succidit, cepit et asportavit, transgressiones prædictas a prædicto secundo die Aprilis diversis diebus et vicibus usque the twenty eighth of the said month of April continuando*. Upon not guilty pleaded, verdict was given for the plaintiff, and intire damages. Upon which Mr. *Branthwaite* for the defendant moved in arrest of judgment, that the cutting of the trees could not be laid with a *continuando*; and therefore intire damages being given, the jury shall be intended to have given for that as well as for the other trespasses. And therefore judgment ought to be arrested, because no damages ought to have been given for that. And *Holt* chief justice said, that it was time that this exception should be settled; and that in order to effect it, they would consider among themselves, and give judgment after deliberate consideration had. And afterwards at another day *Holt* chief justice declared, that they were all of opinion, that the plaintiff ought to have his judgment,

No exception can be taken after verdict to a *continuando* in trespass, if any of the charges to which it is applied could be laid with a *continuando*. R. acc. ante 239, Skin. 42. 2 Show. 196. T. Jon. 194.

A charge of cutting down trees cannot be laid with a *continuando*. D. Acc. 1 Sid. 224. post 976. Vide ante 239, and the books there cited. Trin. 42. Comb. 426.

BROOK
v.
BISHOP.

D. acc. ante 240.
post 977. Comb.
427.

judgment, because they held the *continuando* as to the trees to be void, because the cutting of trees does not lie in continuance; and then they would intend, that no part of the damages was given for it; but the *continuando* shall be applied to the trespasses that lie in continuance. And as to the objection, that the plaintiff at the trial, perhaps, gave evidence of cutting at several days, by reason of the *continuando*; he answered, that that shall not be intended, since in point of law only evidence of one cutting could be given, for the *continuando* is void. The (a) proper way to declare, where a man will give evidence of several trespasses, which do not lie in continuance, is to say, that the defendant *diversis diebus inter* such a day and such a day cut divers trees; and then he may give evidence of a cutting upon any of the days between the days mentioned in the declaration. See 21 Hen. 6. 43. Judgment for the plaintiff.

Marsfield *vers.* Marsh.

In trover by an administrator on the possession of the intestate, the defendant cannot give in evidence upon the general issue that the supposed intestate made a will and executor, and that the executor is living. S. C. Salk. 285. 7 Mod. 141. Holt 44.

In trover on the possession of the administrator he may. S. C. Salk. 285. 7 Mod. 141. Holt 44.

Trover de 12 thecis spirit. & de 50 galon. aquæ caldæ good. S. C. with some difference. 7 Mod. 141.

T*Rover* by an administrator. The plaintiff declared of a possession in the intestate, and of a loss by him in his life-time (among other things mentioned particularly in the declaration) *de duodenis thecis, Anglice casks de spirit. et de quinquagint. galon. aquæ caldæ, &c.* and then he lays the conversion to be in his own time, &c. Upon not guilty pleaded, and a trial at Guildhall before Holt chief justice, Tuesday the twenty-sixth of January 1702, Hilary term, 1 Ann. Mr. Branthwaite offered to give in evidence, that there was an executor alive; and then (by him) that will destroy the property in the plaintiff. And in *trover* he cannot recover; but perhaps it might have been otherwise in trespass, because the bare possession would have been enough. *Sed non allocatur per* Holt chief justice. For (by him) the defendant should have pleaded it in abatement; and it cannot be given in evidence upon not guilty pleaded, because here the property is laid in the intestate. But if the plaintiff had declared upon a property in himself, and it had appeared upon the evidence, that he claimed the goods but as administrator to J. S. &c. there the evidence of an executor, &c. had been a bar to the plaintiff, because it would have defeated his property, upon which his action is founded. And a verdict was given for the plaintiff, and intire damages. Upon which Mr. Branthwaite moved in B. R. in arrest of judgment, that the words, *thecis de spirit.* with a dash, and *galon.* were so uncertain, that the court could not understand what the plaintiff meant by them; and therefore that the damages being intire, they were given for them as well as for the other things; and therefore that judgment ought to be arrested. But after consideration had of it, Holt chief justice pronounced the opinion of the court to be, that the

words, *thecis de spirit.* were certain enough, without shewing what sort of spirits they were, since they were contained in the casks. And he compared it to the case of *trover* (a) for a library of books, without specifying the particulars, and good; and that the words *de spirit.* with a dash must be understood *de spiritibus.* 2. They held, that the word *galon.* was very proper. In *Spelman's* glossary *galonis, galona, galonæ,* is expounded to be a galon. He cited also the ordinance of measures, 51 *Hen. 3.* and the statute *de pistoribus, c. 8.* the said word used in the same sense. Judgment for the plaintiff.

MANFIELD
W.
MARSH.

(a) Vide ante
538.

Williams *vers.* Cutting.

S. C. 3alk. 24. 7 Mod. 154. 11 Mod. 24.

ERROR C. B. In *assumpsit* the plaintiff declared upon the custom of merchants upon a note payable upon demand; and there was also another count upon an *indebitatus assumpsit.* Upon *non assumpsit* pleaded, the jury gave several damages; but the judgment was entered, that the plaintiff should recover *damna sua per juratores prædictos in forma prædicta assessa.* And upon error brought, the error assigned by Mr. *Pengelly* was, that the first count was not maintainable, and the judgment, being given for the damages given by the jury upon the said promise, was erroneous. Against which it was urged by Mr. *Weld*, that the judgment ought only to be reversed *quoad* and affirmed for the rest. And to prove that, he cited *Hob. 6. 1 Roll. Rep. 24. Jacob v. Mills. and Moor 708.* Against which Mr. *Pengelly* cited *Allen 74, 75. 1 Roll. Abr. 775. pl. 4. 1 Keb. 232. Stile 121, 125. 3 Keb. 199, 213. 1 Vent. 27, 39. 2 Keb. 506, 535.* and that the resolutions have been always contrary to the said case of *Jacob v. Mills*; and so it was adjudged, *Cro. Ja. 424.* within three years after the said case of *Jacob v. Mills*; and that the plaintiff should have entered a *remittit* for the damages upon the first promise, and taken judgment for the rest, as 2 *Saund. 378.* And it was held by the whole court, that the judgment being intire could not be reversed for part. And *Holt* chief justice said, that he had known it ruled accordingly in his time upon debate, and that the cases in *Hobart* and *Moore* were not supported by any subsequent authority. Note, all the judges held clearly, that the first count was ill, according to the case of *Clerk v. Martin*, before, 757. except *Powell* justice, who doubted. Judgment was reversed, *nisi, &c. (a)*

If an intire judgment is given for damages upon several counts, and one of the counts is ill, the judgment shall be reversed in toto, tho' the jury found several damages upon each count. S. C. *Holt 273.* and vide *Carth. 234. Com. Pleader 3. B. 20. 2d. Ed. vol. 5. p. 305.*

A promissory note is not a negotiable instrument within the custom of merchants. R. acc. ante 757, and see the books there cited, 3 & 4 Ann. c. 9.

(a) And the rule was afterwards made absolute, see the judgment. Lill. Ent. 227.

Intr. Pasch. 13
W. 3. B. R.
Rot. 431.

Cooper *vers.* The Hundred of Basingstoke.

Vide Com. Hundred. c. 2. 3. 4. 2d. Ed. vol. 3. p. 474. Pleader. 2 S. 1. 2d.
Ed. vol. 5. p. 224. Bull. 184.

If robbers
assault a man in
one hundred,
carry him into
another and rob
him there, he
cannot maintain
any action upon
the statute of
hue and cry
against the
former hundred,
S. C. Salk. 614.
7 Mod. 157.
Holt 638.
11 Mod. 8.

Tho' he may
against the let-
ter. S. C. Salk.
614. 7 Mod.
157. Holt 638.
11 Mod. 8.

AN action upon the statute of hue and cry, 13 Ed. 1. *β. 2. c. 2.* Upon not guilty pleaded the jury found a special verdict, upon which the case was thus. Robbers assaulted the plaintiff upon the highway in the hundred of *Mitcheldever*, and they carried him out of that way into a coppice near adjoining to that highway; but this coppice lies in the hundred of *Basingstoke extra*. The robbers took nothing from the plaintiff in the hundred of *Mitcheldever*, where the assault and seizure of the plaintiff's person was made; but they robbed the plaintiff of 28*l.* 1*0s.* in the coppice. And the grand question, whether this action lay against the defendants, or against the inhabitants of the hundred of *Mitcheldever*, or both, was argued at the bar several times; for the plaintiff by Mr. serjeant *Carthew*, Mr. *Mountague*, and Mr. *King*; and for the defendants by Mr. *Pierre Williams*, Mr. *Raymond*, and Mr. *Broderick*. And now this term Holt chief justice pronounced the opinion of the court to be, that the plaintiff ought to have judgment. And the method that he pursued in delivering his opinion was by way of answer to the objections taken by the counsel for the defendant at the bar. In order therefore the better to understand the reasons of the chief justice, it seems necessary to repeat the substance of the arguments and objections made by the defendant's counsel.

The hundred
may be liable
on the statute of
hue and cry for
a robbery com-
mitted out of
an highway.
S. C. Salk. 614.
Holt 638. 11
Mod. 8. R. acc.
1 Mod. 221. &
Semb. acc.
Carth. 71. and
vide 3 Mod.
258.

In an action on
the statute the
declaration need
not state that
the robbery was
committed in
the day. R.
acc. Carth.
71. 3 Mod. 238.
Nor need a spe-
cial verdict find
it.

1. And first they agreed, that this action ought to be brought against the hundred in which the robbery was committed, by the express words of the act of parliament. But they argued, that although the goods were not actually taken from the person of the defendant in the hundred of *Mitcheldever*; yet since the assault and seizure were made there, and the goods were immediately taken from the plaintiff; that will relate to the seizure, and amount to a robbery in the hundred of *Mitcheldever*. And to prove that, they cited several rules of relation, and cases concerning it, as *Dier* 78. *Plowd. Com.* 260. 14 *Hen.* 6. 47. *A.* being *non-compos* gives himself a stroke, then he recovers his senses, and then dies, he shall not be adjudged *felo de se*. 33 *Affis.* 7. *Fitzh. corone* 210. If a servant intends to kill his master, and then he departs from his service, and then he kills his master, it is *petit treason*, and yet there was a year betwixt the first design and the act done. 44 *Ed.* 3. 14. 4 *Hen.* 4. 2. *Fitzh. corone* 97. *Hale P. C.* 72. *Staunf. P. C.* 27. So here, the assault and seizure, which caused the fear, without which there can be no robbery, continued until the taking away

away of the goods. And if there shall be so strong a relation, in case where the life of a man is in danger; much more ought it to be encouraged, to intitle a man to a remedy. They cited also 1 Sid. 263. *Pledall v. the hundred of Thistleworth*, where it was held, that if robbers drive or cause the waggoner to drive, his waggon out of the way in the day time, and they do not rob him till night, yet the hundred is liable, and it shall be adjudged robbery in the day, because the first seizure is the robbery. So if a man be seized in the highway, and carried into a house, and robbed there, the hundred shall be liable; and yet for a robbery in a house the hundred is not liable. So 1 Sid. 367. *Turner and Cary v. Smith*, it is reported, that it was said (which must be meant by the court) that if robbers seize persons in the hundred of *A.* and lead them into the hundred of *B.* and rob them there, the hundred of *A.* shall be liable. And there is great reason for supporting such resolutions, because the first fault was in the hundred of *A.* &c. For if watch and ward had been kept there, no robbery could have ensued.

But to this objection *Holt* chief justice answered, that it was evident by the verdict, that the robbery was committed in the hundred of *Basingstoke*. For if this fact had happened in two counties instead of two hundreds, the robbers must have been indicted in the latter county, and tried there. For it is impossible to make the assault and seizure amount to a robbery; and there is no colour here, to make it a robbery by relation in the hundred of *Mitcheldever*; for relation never holds place, but where the thing, to which the relation is made, is the immediate and efficient cause of the thing relating; but here the assault is not the efficient cause of the robbery, for at most it is but *causa sine qua non*. And this case is not like the cases of murder, where the stroke is given upon one day, and the party dies upon another day of the said stroke, this death will relate to the stroke for some purposes, but not for all; for as to the forfeiture it will relate to the stroke, but not for collateral purposes. Therefore if the murderer be indicted, and the indictment shews, that the stroke was upon one day, and the death upon another, and it concludes, that so he murdered him upon the former day; it is ill, because no felony was committed till the death; but if it concludes, that so he murdered him the day of the death, it is good. 4 Co. 42. So if a mortal wound be given, and the party languish for a month, and *A.* knowing thereof receives the murderer; or if constables arrest him, and permit him to escape, and then the person wounded dies; the receivers are not accessory to the felony, nor are the constables felons. 11 Hen. 4. 12. b. So here there was no robbery committed, but in the hundred of *Basingstoke*, and relation can-

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not

COOPER
v.
BASINGSTOKE
Hundred.

If robbers seize a man in one county, carry him into another, and rob him there, they cannot be indicted except in the latter county.

A relation never holds place unless the thing to which the relation is made is the immediate cause of the relative.

If a man is struck on one day, and dies of that stroke on another, he will be a felon from the day of the stroke as to some purposes, but not for all.

COOPER
v.
BASINGSTOKE
Hundred.

A man who is
assaulted in the
highway and
carried into a
house and there
robbed, or who
is carried into
another hundred
and detained
there till night
and then robbed
cannot maintain
any action on
the statute of
hue and cry. S.
P. 7 Mod. 157.
11 Mod. 12.

not hold place. He cited *Hutt.* 125. as a case in point; and said, that *Goulasb.* 86. admits the present question. He said farther, that the true reason of this case is this, that the hundred is not chargeable because the robbery was done there which they did not prevent; but because the robbers were not arrested within forty days after, &c. And that this is the true reason why the hundred is not chargeable, appears from hence, that if they produce the robbers, notwithstanding that the party robbed had suffered very great damage, the hundred will be excused. Until a robbery is actually committed, the hundred is not obliged to make hue and cry after the malefactors, and consequently ought not to be charged for not producing them. And therefore in this case there being an assault only in the hundred of *Mitcheldever*, but no robbery, and the robbery being in the hundred of *Basingstoke*, the hundred of *Basingstoke* are obliged to seize the offenders; and for not having done it, they are chargeable to the plaintiff. As to the objection made, that if *A.* be assaulted upon the highway in one hundred in the day, and is carried into another hundred, and is not robbed there till night; that yet the second hundred would be liable. He answered, that he was of opinion, that in the said case the action failed; because the assault was not a robbery, to charge the first hundred; and the other hundred cannot be chargeable, because it was done in the night. So if *A.* be seized in the highway, and carried into a mansion house: he held that *A.* would be without remedy; because for a robbery in a house the hundred is not chargeable. 7 Co. 6. *Sandhill's case.* 2 Inst. 569. *Moor* 620. pl. 848.

Another exception was taken by the defendant's counsel, that the defendants cannot be charged in this action, because the robbery was committed in a coppice and not in the highway; and (by them) the hundred is only liable, where the robbery is done in the highway, or in some public place where watch and ward may be kept; but it would be hard to punish the hundred, where they cannot prevent the robbery by keeping of watch and ward. Now in a coppice they cannot keep watch and ward, because they would be trespassers. And that is the reason, why they shall not be chargeable for a robbery done in a house. By 13 *Edw.* 1. cap. 5. highways are to be enlarged by cutting of bushes, &c. and if the lord of the soil does cut the bushes, he shall answer for the robbery. They cited also *Cro. Car.* 266. *Rex v. Ward and Lime*, where it is said, that the way there was not such, as the inhabitants ought to keep watch and ward, or should be answerable for a robbery in; which argues, that it was plainly the opinion of the court, that they should not be chargeable, but for robberies done in the highway.

Holt

Holt chief justice, the next day after he had delivered the opinion of the court, said that he had in haste omitted to answer this objection. But he said, that they were all of opinion, that it is not necessary to be a highway, in which the robbery is done, to charge the hundred.

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v.
BAKINGSTON
Hundred.

Another objection was taken by the defendant's counsel, that it was not found, that the robbery was done in the day, and then the hundred will not be liable. 7 Co. 6. b. And it being a special verdict nothing shall be intended, but it shall be presumed by the court that the jury have found the whole fact.

But to this *Holt* chief justice upon the argument said, that it must be found, that it was done in the night; otherwise it shall not be intended, for such evidence ought to be given on the part of the defendants. And he did not regard the same exception, when he pronounced the opinion of the court. See 2 Inst. 509. Judgment for the plaintiff by the whole court.

In an action upon this statute, tho' it is not alleged, that the robbery was in the day, and a special verdict is found, which does not find it; is liable.

yet if it was not found that it is in the night, the hundred

Reading *vers.* Rawsterne.

S. C. Salk. 423.

Ejectment upon the demise of—*Bernard.* Upon not guilty pleaded, the cause being tried at *nisi prius*, a case was made for the opinion of the court, which in effect was thus. *A.* being seised of the lands in question in fee, had issue two daughters *B.* and *C.* *B.* marries, and has issue *D.* and dies; *A.* devises the lands to *D.* and his heirs, and dies; *D.* dies; and the heir of *D.* of the part of his father, and the heir of *D.* of the part of his mother, entered into the lands, and took the profits for more than twenty years before this action brought; which action was brought by the plaintiff as devisee of — *Bernard*, who was heir of *D.* of the part of the father of *D.* And this case was argued by Mr. *Cowper* of the one side, and by Mr. *Montague* of the other side.

One alone of several coheirs cannot take from the common ancestor by descent. S. C. Com. 123. Proc. Chan. 221. 3. Eq. Abr. Devises. 1. c. 1. Ed. P. 333.

The afore if he devise lands to one of them the whole shall pass by the devise, and no part by the descent. S. C. Com. 123. Proc. Chan. 212. 2 Eq. Abr. Devises. 1. c. 1. 2 Ed. p. 333. see also Ow. 65. Cro. El. 431. 4 2 Danv. 558. pl. 12. 2 Sid. 53. 78, 79. 3 Lev. 127. Gouldsb. 88. 1 Leon. 112.

And the first question was, whether *D.* took the whole lands by purchase, or one moiety by descent and the other by purchase. And the whole court held, that *D.* took the whole by purchase. For though where the same estate is devised to the heir in quantity and quality, as he would have taken by descent if there had been no devise; the devise would be void, and such heir will take by descent; as if a man seised of lands of the part of the mother devise them to the heir of the part of the mother, the devise will

315. The statute of limitations is no bar to an ejectment, unless the lessor of the plaintiff or some person under whom he claims have been actually disseised. 'Tis not necessarily a disseisin to take the profits of an estate without right, vide ante 312. and the cases there cited. 3 Bl. Com. 170. Co. Litt. 243. b. 373. b. Com. Se. fin. F. 2d Ed. Vol. 5. p. 476.

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R. cont. Gilpin
v. —
Cro. Car. 161.
pl. 1.

be void, and the heir will take by descent, 3 *Lev.* 127. *Hedger v. Rowe*: and as where a man devised lands to his heir in fee, upon condition that he should pay 20 *l.* to *A.* and upon refusal to pay, &c. he devised them to *A.* in fee; it was held, that the devise to the heir was void, and that it was an executory devise to *A.* if the heir did not pay, *Cro. Eliz.* 919. *Answorth v. Pretty*: yet in this case the devise was not to the heir, for one of the daughters, and consequently her representative, is not heir alone, but *D.* and *C.* were heir to the devisor, *Co. Lit.* 163. *b.* If a man plead a descent *uni filiae et cohaeredi*, it will be ill. Besides, if the court hold that *D.* took a moiety by descent, they ought to hold consequently, that the devise as to the moiety was void, and then the said moiety ought to descend to *D.* and *B.* as heirs to *A.* and consequently *D.* had but three fourths of the lands, where they were intirely devised to him. And therefore this case is not within the reason of the cases cited; but of necessity it must be adjudged, that *D.* took the whole by purchase. As to the objection, that a devise cannot be good in part and void in part as to one intire thing, the court said, that it could not be supported; because if a man devise one moiety of *Blackacre* to *B.* his heir in fee, and the other moiety in tail; the heir shall take the fee by descent, the devise as to that being void, and the other in tail he shall take by the devise by purchase.

2. A second question was, whether the taking of the profits by the heir of the part of the mother of one moiety shall not bar the heir of the part of the father after quiet enjoyment for twenty years, by the statute of limitations, from bringing an ejectment. And the whole court held, that it should not. For (by them) the statute of limitations does not bar a man, but where there is an actual disseising. Now here the bare taking of the profits is not an actual disseising. Besides, that where two men are in possession of land, &c. the law adjudges it to be the possession of him who hath the right, until he be actually disseised. *B.* and *D.* were not tenants, for *B.* was a mere stranger; and though he took a moiety of the profits, that will not make him tenant in common; for a man cannot disseise another of an undivided moiety, as he may of such a number of acres. But farther, if they had been tenants in common, it is true, that one tenant in common may disseise the other; but that must be an actual disseisin, (a) as the hindering him from coming upon the land, &c. and not by a bare perception of the profits. As to the objection, that the bringing of the ejectment for a moiety admits him to be out of possession of it, *Holt* denied it to be so. For if *A.* seised of land makes a lease of one undivided moiety, and

(a) Vide ante 312. and the cases there cited, and 3 *Bl. Com.* 170. *Co. Litt.* 243. *b.* 378. *b.* *Com. seisin F.* 2 Ed. Vol. 5 p. 476.

J. S. ousts the lessee, he must bring his ejectment for a moiety; so if they were both put out of possession, they must have several remedies, as several assizes, &c. Judgment was for the plaintiff.

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RAWSTE. NE.

Brown et ux. *vers.* Gibbons.

S. C. Salk. 206. 7 Mod. 129.

CASE for words spoken of the wife by the defendant, viz. Mrs. Brown is a whore, and has done as all whores do; *per quod* the plaintiff being a tradesman lost such and such, viz. A. B. &c. from being his customers, who were his customers before, &c. Upon not guilty pleaded, the defendant at *nisi prius* gave evidence by way of mitigation of damages, that Mrs. Brown was a whore. And the evidence was very strong. Upon which the jury gave damages but 20 s. to the plaintiffs. And now Mr. Mountague moved, that the plaintiffs might have their full costs; which was opposed by serjeant Darnall. And the court held, that this action is not an action for slanderous words within the meaning of the statute of 21 Jac. 1. c. 16. because the special damage is the gist of the action, without which it would not lie. And therefore such an action lies for the husband alone, without joining the wife, which is otherwile in a common action for words. And Cro. Car. 140. Law v. Horwood was cited, and allowed by the court to be a case in point. And Powell chief justice said, that if the master brought an action of battery against J. S. for a battery committed upon his servant, *per quod servitium amisit*, if the jury upon not guilty pleaded gave damages under 40 s. the plaintiff should have full costs, notwithstanding the statute of 22 & 23 Car. 2. c. 9. which allows in common actions of battery no more costs than damages, where the damages are less than 40 s. And the plaintiff in the principal case had full costs.

In case for words which are only actionable in respect of some special damage, the plaintiff shall have full costs, tho' the damages are under 40 s. Vide post 1588. Str. 936. Borr. 1688. Bl. 1062.

In an action for beating a servant per quod, &c. the plaintiff shall have full costs tho' the damages are under 40 s. D. acc. Bl. 854.

Cole *vers.* Rawlinson.

S. C. Salk. 234. Holt. 744.

EJECTMENT. Upon not guilty pleaded the jury found a special verdict, upon which the case was thus. *Billingsey* seized in fee of the Bell tavern in St. Nicholas Lane, London, married a widow, who had a son by her first husband; and upon the marriage *Billingsey* by lease and release conveyed the Bell tavern to trustees, to the use of himself for life, remainder to his wife for her life, remainder to their first son in tail, &c. remainder to the right heirs of the wife, &c. *Billingsey* had issue by the said woman *John Billingsey*, and died. The wife afterwards made her will in these words (*inter alia*) Item I give, ratify and

the death of the devisor, by the same instrument from which he derived his interest, the devise (a) is intituled to the house in fee.

(a) See the devise more at large, 1 Bro. Parl. Caf. 109.

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confirm to my son *John Billingsley* all my right, title and interest which I now have, and all such term and terms for years, which now is, or at any time after my decease may happen to be, in my power to dispose of, in whatsoever I hold by lease of *J. S.* and *J. N.* and also the house called the *Bell* tavern in *St. Nicholas Lane* together with the stable thereunto adjoining. And the question was, whether *John Billingsley* took by the devise an estate for life in the reversion after the determination of the estate tail, or the inheritance of the reversion. If he took for life, then judgment ought to be for the plaintiff; if he took the inheritance, then judgment ought to be for the defendant. And the three judges, *Powell*, *Powys*, and *Gould*, were of opinion, that *John Billingsley* took the inheritance, &c. against the opinion of *Holt* chief justice. This case was three times argued at the bar. And now the judges delivered their opinions *seriatim*. And the reasons of the said three judges were, 1. That the intent of the devisor appeared plainly to be, to devise a fee; because she knew, that the devisee was tenant in tail before by the settlement. 2. There is not any end of the sentence, till one comes to the words [And also the *Bell* tavern] and so this latter part of the sentence will borrow the word give from the former part of the sentence; otherwise (a) nothing would pass by this part (And also, &c.) And then for the same reason they will borrow the words which limit the estate, *viz.* all my right. But otherwise it had been, if the words, I give, had been repeated: then they would have made it a new sentence, and disjoined it from the words of the limitation. And for this they cited, 1 *Roll. Abr.* 844. *M. pl.* 1, 2. *Moor* 52. So where a man granted hedge-bote to be taken by the assignment of his bailiff, and also fire-bote: the words, and also fire-bote, borrow the words, by the assignment of the bailiff, as well as the word *grat*, and the grantee cannot take fire-bote without the assignment of the bailiff, *per Shelly*, *Dier* 19. b. 3. They must make this construction, otherwise the devise would be void, because the devisee had an estate in tail before, and therefore a devise to him for life would be useless and void. *Powys* justice said farther, that the word (in) should be understood, as if it had been said, And also in the *Bell*, &c. for *quod subintelligitur non deest*. And *Gould* justice said, that the words, the *Bell* tavern &c. were sufficient to pass the inheritance in this case. To prove which, he cited *Moor* 873. *Whitlock v. Harding*, where a man devised his lands for ninety-nine years, and afterwards he devised all his lands of inheritance to *B.* though in strictness the words, all his lands of inheritance, were a description of the lands, not of the estate, yet it was held, that a fee simple passed: because it appeared, that the devisor intended to pass a fee, for an estate for life after ninety-nine years was of so small value, that it could not be imagined, that the

(a) Vide ante
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the devisor designed to devise it. And the same reason holds in this case. *Powell* justice added, that it was lawful, to transpose words even in deeds, to supply the intent of the parties; and much more in cases of wills. Therefore he was of opinion, that they ought to read the sentence in this manner, *Item I give, &c. to my son John Billingsley all such term, &c. and all my right, &c. in whatsoever I hold by lease of J. S. or J. N. and also the Bell, &c. this will pass a fee plainly.* And for these reasons these three judges concluded, that judgment ought to be for the defendant.

But *Holt* chief justice *e contra* was of opinion, that judgment ought to be for the plaintiff, holding that an estate for life only passed in the *Bell* tavern, &c. And he said, it is a principle known and certain in the law, that upon a devise to *J. S.* without limiting any estate, *J. S.* will take it but for his life, unless there be some special matter in the will, that shews, that the intention of the devisor was to devise a larger estate. And there is no difference between a devise of lands in possession, and a devise of a reversion. And in this case if this devise had been to a mere stranger, who had not had an estate tail before, it would have passed but an estate for life. And for that purpose he cited *Cro. Eliz.* 330. *Dickins v. Marshal*, where *J. S.* devised his lands and goods to his son and daughter, after his debts and legacies paid, to be equally divided between them, and held that they took but an estate for life: and yet it might be objected, that if the debts and legacies were not paid in the life of the daughter, she would take nothing.

Objection. These words, and also the *Bell, &c.* relate to the words, All my right, &c.

Answer. That cannot be, because the words, All my right, &c. which I now have, and all such term, &c. are relative words, and must have a subject, and that is what follows, viz. in whatsoever I hold by lease, &c. and then the words, and also the house, &c. follow, which may relate to the words, give, &c. and cannot relate to the words, all my right, &c. which are satisfied before by the words, in whatsoever I hold by lease, &c. Farther, turn the words into *Latin*, *Item dono, &c. omne jus meum, &c. et omnes tales terminum, &c. in quocunque teneo per dimissionem, &c. ac etiam domum, &c.* and so the words are very good grammar, and there is no reference to the word right, and so as to the *Bell* tavern the devise is, that she gives the house called the *Bell* tavern, &c. which will pass but an estate for life.

Objection. The preposition *in* shall be understood.

Answer. G 4

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Answer. It is understood sometimes in *Latin*, never in *English*.

Objection. The copulative *and* joins them.

Answer. No, because they are not of the same nature, viz. leasehold and fee-simple. And therefore the words, the house, &c. cannot relate to the preposition *in*, the *Bell* tavern not being, lease; and therefore it must be the accusative case, and so cannot relate to the right, &c. but to the words, give, &c.

Objection. The words shall be transposed.

Acc. Cowp. 356.
3 T.R. 494.

Answer. That cannot be, because they are good sense and grammar as they are; for that is only done, to make a nonsensical word sense.

Objection. *Moor* 873.

Under a devise
of lands of in-
heritances, the
fee passes. vide
Com. Dig. De-
vise. N. 4. 2d.
Ed. vol. 3. p. 2.

Answer. If the reason there given should be admitted to be the reason of the judgment, yet it differs from this case; because there the term for ninety nine years appears upon the face of the will and is created by it. But that was not the true reason of the judgment. The reason was, because a devise of all his lands of inheritance passed a fee, and it might be a great question, if it did not pass a fee, why he devised them by the name of his lands of inheritance. And the case is reported in *Hob.* 2. to have been adjudged upon the same reason. Indeed the case there is put differently, because it is there a devise of the inheritance of his lands, which is a fee without doubt in a will.

Objection. 1 *Roll. Abr.* 844. *M. pl.* 1, &c. and the other cases to the same purpose.

Answer. The said cases are not parallel to the case in question, because there is a plain relation to all that precedes, as well the words of limitation as of grant; but here the words, right, &c. are satisfied by, and relate to, leases, as is said before. And he cited *Cro. Car.* 447, 449. *Wilkinson v. Merryland*; where a man devised all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods. whereof he was possessed, to his wife, and died having a mortgage in fee forfeited; and held that no fee passed: and yet mortgage is an extensive word, but there wanted words of inheritance; which proves, that in the exposition of wills no regard ought to be had to external accidents, (which *Powell* justice agreed in his argument.) And therefore the reasons urged, that
this

this estate came from the father of *John Billingsley*, &c. are not prevalent.

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Objection. That according to this exposition the devise will have no effect.

Answer. That is no reason to construe a larger estate to pass by the will, than the words will pass; for it does not appear in the will itself. And (by him) for these reasons an estate for life only passed, and the plaintiff ought to have judgment. But by the other judges judgment was given for the defendant.

Afterwards a writ of error was brought in the exchequer chamber upon this judgment. (a)

(a) And it was affirmed there and afterwards in parliament, Vide 1 Bro. Parl. Cas. 108.

Clerk *vers.* Udall.

S. C. more at large 7 Mod. 106.

IN *assumpsit* upon *quantum meruit*, upon *non assumpsit* pleaded and verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was ill; because it was to pay such sums, as the plaintiff *rationabiliter habere mereretur*. Upon which judgment was stayed until this term. And now the court held, that it was well enough, and the same with *meruit*. Judgment for the plaintiff.

Vide post 1223.

Dike *vers.* Brown.

UPON a motion for a prohibition, the case was, the defendant libelled in the spiritual court for tithes of faggots made of loppings of trees; and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber-trees above the growth of twenty years. And it was alleged, that sentence was given in the spiritual court, and therefore the plaintiff comes here too late, to have a prohibition. But *per Holt* chief justice the sentence will not hinder the having a prohibition in any case. but in case of prohibitions grounded upon 23 H. 8. c. 9. for citing out of the diocese. But because the plaintiff had not pleaded this matter in the spiritual court, they denied the prohibition; because the spiritual court has general jurisdiction of tithes, and if any special matter deprives them of their jurisdiction, it must be pleaded there. And if it had been pleaded there, and issue joined upon it, and upon the trial it had been found not to be *silva caedua*, it had been well. But if they had refused to admit the plea, a prohibition should have been granted.

A prohibition shall not be granted to proceedings in the spiritual court for tithes of wood not tithable, unless it appears upon the proceedings there not to be tithable.
R. acc. 1 Barn.
B. R. 71.

Intr. Mic. 12.
W. 3. B. R.
Rot. 197.

Crofs *vers.* Smith.

A certiorari lies to remove proceedings from the lord of a franchise to whom cognizance of pleas is granted.
S. C. Salk. 148.
3 Salk. 79.
12 Mod. 643.

A certiorari removes all things to which it can apply which occur between it's teste and return.
S. C. Salk. 148.
7 Mod. 138.
D. acc. arg.
Str. 754.

And so does a recordari. S. C. Salk. 148.
7 Mod. 138.
or a writ of error. vide 1 T. R. 280.

A certiorari to remove a plaint super leuam will remove a plaint levied after its teste.
S. C. 7 Mod. 138. R. acc. post 1305.
vide post 1199.

The lord only can take advantage of cognizance of pleas. D. acc. post 1340.
vide Com. D'g. Courts. P. 3. 2d Ed. vol. 2. p. 609.

Proceedings upon cognizance claimed.

ERROR upon a judgment given in the court of the bishop of *Ely* in case for words spoken the twenty-fifth of *March*, 12 *Will.* 3. of the plaintiff. The error assigned was, that a *certiorari* issued out of the common pleas, *teste* the twelfth of *February*, 12 *Will.* 3. returnable in *Easter* term following, to remove the cause, and it was allowed, and nevertheless they proceeded afterwards to give judgment for the plaintiff. The defendant in error pleaded a grant to the bishop of *Ely* of consuance of pleas, and an allowance of it in this court 21 *Edw.* 3. and that the cause of action arose within the jurisdiction of the said court, and that this matter was returned to the common pleas upon the writ of *certiorari*, and that so the court of *Ely* had good authority to proceed, &c. To this plea the plaintiff in error demurred. And it was argued several times at the bar by Mr. Parker, Mr. Broderick, and Mr. Eyre, for the plaintiff in error, and by Sir Bartholomew Shower, Mr. Ward, and Mr. Weld for the defendant in error. And the points made by them were, 1. Whether a *certiorari* lay out of the common pleas to the court of *Ely*. 2. If it lay, whether it would be a *superfedeas* to their proceedings. And the whole court held the affirmative. And *Holt* chief justice said, that there are three sorts of inferior jurisdictions. The first is *tenere placita*, which is the lowest, and is a concurrent jurisdiction; in which case the plaintiff may proceed in the inferior court, if he will, but that does not deprive the subject, of having it tried in a superior court (if he will) of the king's; and that for good reason, for if it were otherwise, a man who comes by chance into an inferior jurisdiction, might be arrested there, and detained in gaol a long time for want of bail. The second sort is consuance of pleas, which is by grant to some lord of the franchise; and it is he alone who can take advantage of it, neither the plaintiff nor defendant, for he cannot plead it to the jurisdiction of the court; but the lord of the franchise, by his bailiff or attorney, must come in and claim the franchise; and though the lord ought to have the action, yet this court is not ousted by it, but the plea remains under the controul of this court; for day is given here upon the roll to the parties, to be in the inferior court at a day certain, and the parties are commanded there, and the tenor of the record of this court is sent, for the inferior court to proceed, and if justice is done there, all is well, but the record is here; and if justice is not done there, as if the court there does not proceed upon the day prefixed, or if the judge misbehaves

behaves himself, &c. the (a) plaintiff shall have a summons. And it is the benefit of the lords only, that is considered in this matter. But these jurisdictions were hardships to the subject, and allowed by 27 H. 8. c. 24. rather for their antiquity than for any other reason, and they were detrimental to the prerogative of the crown, and therefore *certiorari*'s were always allowed, to prevent the grievances of these inferior jurisdictions. The third sort are exempt jurisdictions, as where the king grants to a city, &c. that the inhabitants shall be sued within the city, and not elsewhere. Such a grant may be pleaded to the jurisdiction of the king's bench, &c. if there is a court there, that can hold plea of the cause. But no body can take advantage of it but the defendant; and if he sues a *certiorari*, it will remove the cause, because the defendant has waived his privilege for his own benefit; so that there is no jurisdiction, that can resist a *certiorari*. As in the case of a customary proceeding by foreign attachment, if the defendant cannot find bail below, he may sue a *certiorari*; and upon putting in bail in the superior court the cause will proceed there. The statutes 43 El. c. 5. 21 Jac. 1. c. 23. admit, that a *habeas corpus* and *certiorari* have always been allowed, though the 43 El. c. 5. does not mention expressly a *certiorari*, but under the general words, other writ or writs. As to the distinction taken between the king's court and that of lords of franchises, that a *certiorari* will lie to the former, but not to the latter; it is no concern to the subject, to whom the court belongs. Farther, suppose that the king grants to a corporation, that the mayor and aldermen shall be justices of peace, and that they shall hold a court of sessions; this franchise is as much a right to the town, as this of the bishop of Ely; and yet in common experience *certiorari*'s are granted to them every day.

Objection, It is unreasonable, that these *certiorari*'s should supersede the proceedings of inferior courts; because upon the return of the *certiorari* the court cannot proceed upon the record returned, but the plaintiff must sue a new original.

Answer. The same objection extends to a *habeas corpus* granted by the common pleas, which hath never been questioned. The jurisdiction here is but a bare consuance of pleas, and it is a great question, whether an exempt jurisdiction can be in any case, but in that of a corporation. There is no colour to say, that this is a county palatine. The 24 Edw. 3. 62. pl. 5. cited by Mr. Ward, to warrant that, has no such opinion. And therefore a *certiorari* lies there, as well as to any other inferior court that hath only consuance of pleas. And a *certiorari* will be a *superfedeas*, as well

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(a) D. acc.
2 Wils. 411.

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well as a *habeas corpus*. And that a *habeas corpus* is a *super-sedeas*. *Cro. Car.* 261. is in point.

Another point was made, whether this plaint was removed by this *certiorari*, because the writ was *teste* the twelfth of *Febr.* 11 *Will.* 3. to remove a plaint *tunc nuper levatam sive affirmatam*, returnable *Easter* term 12 *Will.* 3. and the plaint was entred the 25th of *March* between the *teste* and return of the writ. And the whole court held, that this writ removed the plaint, because a *certiorari* is like a *recordari*, and removes all things done in court between the *teste* and return. The same law of a writ of error. 1 *Ventr.* 68. 1 *Roll. Abr.* 395. *Fitz. Nat. Bre.* 71. a. 3 *Hen.* 6. 30. b. And for precedent of that form of writs, *New Thes. Brev.* 37. *Brownl.* 335. And the judgment was reversed by the whole court.

Gould *vers.* Johnson.

Pleadings and Record, post vol. 3. p. 7.

To an action upon an executory promise the defendant cannot plead non assumpsit infra sex annos. S. C. Salk. 422. R. acc. 1 *Ventr.* 191. 10 *Mod.* 104. 1 *Mod.* 89. D. acc. 3 *Atk.* 71. *Semb.* acc. 1 *Mod.* 71. *Burr.* 1281. 'Tis no objection to a declaration that it appears upon the face of it that the time prescribed by the statute of limitations for bringing the action had elapsed before the declaration was delivered or filed. S. C. Salk. 422. *Semb.* acc. post 934. vide post 1204.

ERROR upon a judgment of the common pleas in *assumpsit*, where the plaintiff declared, that the defendant, in consideration that the plaintiff would receive *A. B.* and *C.* into her house *ut hospites*, and provide for them meat, drink, &c. to pay so much as she should deserve; and then the plaintiff avers, that she received them into her house, but does not say *ut hospites*, and provided meat, drink, &c. The defendant pleaded *non assumpsit infra sex annos*. Upon which the plaintiff demurred. And judgment in the common pleas for the plaintiff. And it was agreed by all, that the plea was ill, for this being an executory collateral promise, the defendant cannot plead *non assumpsit infra sex annos*, but should have pleaded, *causa actionis non accrevit infra sex annos*; for if the cause of action accrued within six years, it matters not when the promise was made; but if it had been *indebitatus assumpsit*, that plea had been good. Then *Mr. Chetham* and *Mr. Broderick* for the plaintiff in error assigned two faults in the declaration. 1. That it appears upon the declaration, that the cause of action accrued more than six years before, &c. and therefore it is not necessary to plead the statute, because it appears upon the declaration. And for that *Cro. Car.* 115. was cited as a case in point. *Sed non allocatur*. For the statute in this case, as well as in all others, ought to be pleaded; for it may be, the original was sued within six years after the cause of action; and therefore the defendant shall plead the statute, to the end that the plaintiff may have an opportunity to reply to such matter.

An averment that a party received another into his house and provided him with meat and drink, is *prima facie* tantamount to an averment that he received him as a guest. S. C. Salk. 25. more at large 7 *Mod.* 143.

difference

difference between receiving a man generally, and *ut hospitem*; and in such a case as this they ought to shew a precise performance of the consideration of the promise, to intitle them to the action. And many cases were cited, to all which the chief justice gave a full answer, and said that they came not up to the case in question.

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Objection. *Cro. Jac. 45.* *A.* was bound in a recognizance, that *B.* should appear to an action upon eight days warning, and if he was condemned, should satisfy the debt; but it was not averred, that he had eight days warning. Answer. There *A.* a stranger was to be affected by the appearance, &c. and therefore there ought to be precisely such an appearance, as was mentioned in the condition of the recognizance; and though *B.* appeared upon other terms, that would not charge *A.* a third person. As if *J. S.* be bound in a bond to *J. N.* to pay *J. N.* money; *J. N.* may accept of a horse instead of it: but if *J. S.* be bound to *J. N.* to pay *A.* money; *A.* cannot accept a horse.

Objection. *W. Jones 441.* *Leate's* case; *Assumpsit* in consideration that *J. S.* at the request of the plaintiff should relinquish administration, and permit the defendant to have it, to do such an act; and avers, that *J. S.* relinquished administration, &c. but does not say at the request of the plaintiff.

Answer. There the request was an act to be done by the plaintiff; and if he did not do it, there is no reason, that he should have the recompense.

Objection. 2 *Leon. 53.*

Answer. *Cro. Jac. 404.* is since adjudged to the contrary, that it is not necessary, to aver a request.

Objection. *Cro. Jac. 245. Yelv. 175.* *Assumpsit* upon good consideration to pay to the plaintiff so much *ante inceptum itineris proximi* of the plaintiff to London, avers that he *incepit iter suum* such a day, &c.

Answer. The said case is not law, for it appears, that the money was due; for if that was not the next journey, yet the money was due, because then there was a journey before. Now in this case, receiving a man, and providing meat, drink, &c. is a receiving as a guest. And if the plaintiff received them upon another account, that ought to have been shewn of the other side. And if the words *ut hospites* had been omitted in the agreement, yet it would have been understood the same thing; therefore the inserting

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serting of them will make no alteration. 2 *Saund.* 373. *Tate v. Lewin* and *Stile* 163. *Johnson v. Abington*, prove it. And judgment was given for the plaintiff by the whole court, viz. the judgment of the common pleas was affirmed.

Green *vers.* Young.

If government lays an embargo upon a ship while she is insured, seize her, and convert her into a fire ship, the insurers are answerable for the damage the assured sustained thereby.

IN evidence upon the trial in an action upon a policy of insurance the case appeared to be, that the insurers agreed to insure the ship from her arrival at ——— in *Yamaica* during her voyage to *London*; and an embargo was laid upon the ship by the government; and afterwards they seized the ship, and converted her into a fire ship, and offered to pay the owners. And the question was, if this would excuse the insurers? And *Holt* chief justice seemed to incline, that it would not, and that this was within the words, detention of princes, &c. but he gave no absolute opinion, because the cause was referred to the three foremen of the jury. In the same case he said, that if a policy of assurance be made to begin from the departure of the ship from *England* until, &c. and after the departure damage happens, &c. and then the ship deviates; though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

Tho' a ship deviates in the course of her voyage, the insurers are responsible for any damage which happened before the deviation. S. C. *Salk.* 444. vide *Str.* 1249. *Dougl.* 16.

Tilly *vers.* Richardson.

S. C. *Salk.* 97. but no judgment given, 7 *Mod.* 120.

If a writ of error is brought upon a judgment of affirmance, if bail was requisite upon the first writ of error, tho' it was put in, fresh bail shall be put in upon the 2d. R. acc. 8 *Mod.* 79. *Str.* 527.

RICHARDSON brought an action against *Tilly* warden of the prison of the *Fleet* in *C. B.* for a debt due to him from *Tilly*, and recovered there; upon which *Tilly* brought a writ of error upon the judgment of the common pleas returnable in *B. R.* to which bail was put in, and the judgment of the common pleas was affirmed. Then *Tilly* brought another writ of error upon the judgment of the king's bench, returnable in parliament. And Mr. *Broderick* moved, that the last writ of error might be allowed without putting in bail; because the bail upon the first writ of error was sufficient to secure the plaintiff for what damages he might suffer by the delay, and for his costs. And he said, that this case was not within the statute, which requires bail upon error. *Sed curia contra*, That new bail must be put in; for the king's bench cannot take notice, whether bail was put in in the common pleas or not. For if no bail was put in there, yet the king's bench would proceed upon the writ of error; because the not giving bail does not hinder the proceedings upon the writ of error, but only hinders the writ of error from being a *superfedeas* to the execution.

Omitting to put in bail in error, where it is requisite, does not stop the proceedings in error.

Peers *vers.* Henriques.

S. C. 7 Mod. 124.

Intr. Mich. 1
Ann. B. R. Rot.
46.

A *Assumpsit* upon several promises, one of which was upon an *in simul computasset* for 101*l.* &c. As to 95*l.* the defendant pleaded a good plea in bar, &c. but omitted to give an answer to the residue. Upon which the plaintiff replied, and offered an issue to the matter pleaded in bar. The defendant demurred. And *per curiam*, the whole is discontinued; for the plaintiff should have taken judgment by *nil dicit* for that which was omitted in the plea in bar. But Mr. Eyre for the plaintiff objected, that the defendant could not sever the 101*l.* in his plea; because it was in an *in simul computasset*, which was intire. But *per Holt* chief justice, notwithstanding that, the defendant might plead payment to part, and other matter to the residue.

If the defendant's plea imports to answer a part only of the plaintiff's declaration, and the plaintiff answers the plea and omits taking within proper time, judgment for the part the plea did not import to answer, the whole cause is discontinued.

Vide ante 716. and the cases there cited.

In a count upon an *in simul computasset*, the defendant may plead as to part of the money mentioned in the count.

Bennett *vers.* Verdun.

In *indebitatus assumpsit*, for that, that the defendant being indebted to the plaintiff in 28*l.* of money *Hispaniolæ*, *assumpsit* to pay it, &c. Upon *non assumpsit* pleaded, the verdict was for the plaintiff. And Mr. Brantwaite moved in arrest of judgment, that the plaintiff ought to have said, *ad valorem*, &c. it being foreign coin. For the defendant cannot be indebted in foreign coin no more than in hogs, &c. *Sed non allocatur*. For a man may be indebted in hogs, &c. but in such case the action must be brought in the *detinet* only, not in the *debet* and *detinet*. Farther there is a verdict here, and therefore all the court held it good. But afterwards judgment was arrested, because the plaintiff brought this action for money due to himself in his own right, and also for another sum in another count due to him as executor to J. S. which cannot be joined.

In an *indebitatus assumpsit* the plaintiff may state that the defendant was indebted to him in so much foreign money, without shewing its value in English.

At least no objection can be taken on this account after a verdict.

A man cannot sue in his own right and as executor in the same action.

R. acc. 10 Mod. 315. 11 Mod. 196. Show. 366. 1 Salk. 1. pl. 10. 1 Will. 171. Str. 1271.
D. acc. 1 T. R. 489. Vide Jenk. 296. pl. 49. Hob. 88. 10 Mod. 170. & 11 Mod. 196.

Hart *vers.* Langfitt.

S. C. 7 Mod. 148.

In *indebitatus assumpsit* upon several promises. There were eight counts in the declaration. As to four the defendant pleaded *non assumpsit*; and as to the other four the defendant demurred by the advice of Mr. Serjeant Agar. And the first exception that Mr. Raymond took to the first count was, that it was an *indebitatus assumpsit*, for that,

An *indebitatus assumpsit* lies for nursing a stranger at the defendant's request.

Vide post 982. A man cannot in the same declaration demand several satisfactions for the same thing.

that

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Semb. acc. post
982. vide
ante 224. and
the cases there
cited. 2 T. R. 1.

that the defendant being indebted to the plaintiff in 20*l.* *pro nutriendo cujusdam Edwardi Langfitt infantis* by the plaintiff at the request of the defendant, he assumed to pay; and that an action would well lie upon a collateral promise, but not *indebitatus assumpsit*, because it will not raise a debt. And to prove that, he cited *Moor* 701. pl. 975. *Indebitatus assumpsit*, in consideration that the plaintiff would sell to D. the defendant's factor, at the instance of the defendant, two hundred hogs to the use of the defendant; adjudged, debt did not lie, in error brought. *Cro. Car.* 107, 193. and 1 *Roll. Abr.* 549. *Lit. F.* pl. 2. *Cogan v. Green.* 2 *Ventr.* 36. *Rozar v. Rozar.* *Sed non allocatur.* For *per totam curiam*, it will raise a debt; for if A. comes into the shop of B. and says to him, deliver such goods to C. and I will pay you; this will raise a debt in A. and C. is not to pay for the goods, nor is he liable to B. for it is a gift from A. to C. and a debt for them from A. to B. And the cases cited depend upon a repugnancy in the declaration, for the declaration is of a sale to a third person, and he is liable; and the defendant is only a guarantee, and it is only a collateral promise in him. And as to the case in *Cro. Car.* 193. *Sands v. Travilian* (by which authority serjeant Agar was induced to demur) Holt said, that the attorney had a remedy against the party for whom he acted, notwithstanding that he was employed by the defendant. The exception to the three other counts was, that they were for the same time of nursing, and yet he declared upon several agreements, *viz.* one for three shillings a week, another for two shillings and six-pence a week, another for two shillings, and he has not said [other]; and it appears, that they were for the same weeks. And the court held this exception good, because the one count falsified the others, and the plaintiff has contradicted himself. But upon the first count judgment was given for the plaintiff. See *Moor* 864. pl. 1193.

Regina *vers.* Whistler & al'.

S. C. but with some difference as to the 2d point. 7 *Mod.* 129. 11 *Mod.* 25.

A man who persuades another to kill deer and lends him any thing for that purpose, is liable to the penalties of a statute made in terms against persons killing deer.

Vide 4 *Bl. Com.* 34.

Or persons aiding or assisting therein. 2 *S. C.* but with some

difference. *Salk.* 542. *Holt.* 215. At least in the last case if the preamble of the statute takes notice of the inconvenience arising from combinations to kill them.

ROlfe, Stone, and Whistler, were convicted upon the 3 *W. & M. c.* 10. made against deer stealers, *viz.* Rolfe and Stone, for the killing of five deer in the park of Sir Cecil Bishop, and Whistler, for that, that he *fuit illicite et injuste auxilians et assistens Rolfe et Stone in occisione damarum illarum in incitando et persuadendo Rolfe et Stone to kill the said deer, et accomodando eisdem Rolfe et Stone equum et canem for the said purpose.* This conviction was removed into the king's bench by *certiorari*, and exceptions were taken to it by the counsel at the bar. And they were argued several times by Mr. Montagus, &c. for the defendant, and by Mr. Broderick, Mr. Chesbyre, &c. for the queen. And

the

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the grand question was, whether the defendant *Whistler* was convict of any offence within the said act of parliament? And now this term the judges pronounced their opinions in solemn arguments, viz. *Powell*, *Powys*, and *Gould* justices, that the conviction was good, and ought to be affirmed; and *Holt* chief justice, that it was bad, and ought to be quashed. *Gould* justice declared the reason of his opinion to be, 1. Because the defendant was included within the words of the act, aiding or assisting therein. 2. Because (by him) if the said words had been omitted; yet since in trespass all persons concerned are principals, the defendant should be included within the words, hunt and kill. And as to the first he said, that if the words of the act had been, aiding or assisting thereto, the defendant without doubt had been comprised within such words: then the word *Therein* has the same import as *Thereto*; and therefore that he was comprised within the words of the act. Besides which he said, that it is apparent, that such offenders as the defendant are within the intention of the act; and that appears from the preamble of the statute, which recites, that there were confederacies of such persons, and that they indemnified their associates; and then the statute enacts, that such persons offending in such manner, shall forfeit, &c. That is to say, that such persons, who are in confederacy and combination, and by such means aiding and assisting, &c. And as well he, as *Powys*, relied much upon the intent of the act. And *Gould* justice farther said, that he relied much upon the word *Such* in the act, which couples the body of the act with the preamble, and makes it of equal extent. As upon the statute of 34 H. 8. c. 20. which disables donees in tail of the gift of the king from barring their issues by common recovery, the word *Such* in the body of the act refers to the preamble, and includes all like cases, that is to say, which are such in the mischief and inconvenience. 2 Co. 14. b. Co. Lit. 373. So where the act of 23 H. 8. c. 1. takes away clergy from several offenders, and among them from burglars, robbers upon the highway, and burners of houses; and then the 25 H. 8. c. 3. among other things takes away clergy from burglars, and robbers upon the highway, who do the act in one county and then fly into another county, and are there taken with the mainer and indicted; and then the statute 1 Ed. 6. c. 12. enumerating several offences, takes away clergy from them, but omits burners of houses, and the case of burglars and robbers in one county who fly into another; and by a general clause restores clergy to all other offences, &c. by which means clergy was restored in the two cases before; and then 5 & 6 Ed. 6. c. 10. reciting the several statutes before mentioned, and farther the inconvenience that clergy was restored in the case of burglary, &c. committed in one county where the offender fled and was convict in another county, which they

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(a) Sed vide
Fost. 361. 362.
4 Bl. Com. 34.
Com. Dig. Jus-
tices, T. 1. 2d
Ed. vol. 4. p.
35.

(b) D. acc.
ante 416.

could not have had, if the said act of 25 H. 8. c. 3. had been in force; it is therefore enacted, that the said act of 25 H. 8. touching the taking away of clergy from such offenders, touching such offences from thenceforth to be done, should stand in full force: these words, such offenders, and such offences, must be interpreted such in mischief and inconvenience, and will extend, to take away clergy from burners of houses, notwithstanding the particular recital of the said particular inconvenience, 11 Co. 33. *Alexander Poulter's case*. And the statute 5 & 6 Ed. 6. is a penal statute. And for the same reason here the abettors, procurers and aiders, though absent, being equally mischievous and of ill consequence with those who do the act, (a) they must be taken to be within the statute; especially since the word Aid in its natural extent includes persons absent, who counsel, abet, &c. as 2 Inst. 192. explains it. 2. By him, if the said words had been omitted, the defendant had been within the words, hunt and kill; for in trespass, where all are principals, he who abets the doing of a fact, is the doer of the fact. So in treason, 12 Co. 81. There is no difference between this case and felony, unless that in felony there may be accessories; for it is a rule, that when (b) a statute makes a fact felony, which was not so before, all the accessories before and after the fact are felons, 3 Inst. 59. and consequently in a law where they cannot be accessories, they must be principals. And he, as well as *Powys* justice, relied strongly upon 13 H. 7. 12, 13. where it is held, that the requesting of another to hunt is a hunting within 3 Ed. 1. c. 20. *de malefactoribus in parcis*; for the commanders shall be trespassers as well as the very trespassers; and yet it is a penal law, which shall not be taken by equity. 2 Inst. 199. And *Powys* justice was of the same opinion with *Gould* justice, though upon the arguments he was strongly of another opinion. And he founded his opinion principally upon the intent of the act, as is said fore in the argument of *Gould* justice. *Powell* justice differed from his brothers, in their construction made by the preamble. For (by him) being a penal law, it cannot be taken by equity. But he was of opinion that this conviction was good, because the defendant was comprehended within the very words of the act. For (by him) he is a hunter, killer, &c. in construction of law; and upon issue joined whether he was such or not, this evidence shewn in the conviction would maintain that he was. And (by him) the distinction made, where the penalty is annexed to the offence, and where to the person offending, which governs the case of *Evans v. Finch*, Cro. Car. 437. is nice; for whereas the statute of *Westm. 2. 13 Ed. 1. c. 34.* enacts that if a man ravishes a woman, &c. he shall be a felon, nevertheless the persons aiding and abetting are ravishers; and yet there is nothing that can be a more personal act than that; the same law of a woman aiding, though she is incapable,

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incapable of doing the fact. So upon the act of 3 H. 7. c. 2. which makes the taking of a woman with force and marrying her, to be felony; though by the said act the accessories before the fact are made principals, yet persons aiding and abetting the ravisher after the fact are felons. So upon the statute *de malefactoribus in parcis*, which is a penal law, and by which the penalty is annexed to the persons, as here, misdoers in parks and ponds, &c. The first case upon the said statute was 30 Ed. 1. 10. where it was adjudged that no trespass was within the said act, unless it was a trespass in hunting. The next case was the 5 H. 5. 1. where the breaking the park with intent to hunt was adjudged to be within the statute. Then follows the 13 H. 7. 12, 13. where it is resolved, that the requesting of another to hunt is a hunting within the statute. Also where the 30 H. 1. c. 12. makes such persons as enter the parks of the king or prince, with painted faces, or kill the deer there, felons; by a proviso in the same act it is enacted, that no persons shall be adjudged accessories, but those who shall abet or procure such offence to be done: which was provided to exempt accessories after the fact, from being felons, as otherwise they would have been, notwithstanding that the person offending was made the felon. For it is always a rule, where a fact is made felony, that all (a) persons aiding and abetting to it shall be accessories, whether it be, that the offence is made felony, or the persons offending felons. And for the same reason the procurer in trespass shall be principal, since there is (b) no accessory in trespass. As to the objection, that the case of *Finch v. Evans*, Cro. Car. 473. and *Page v. Harwood*, Allyn 43, 44. makes this difference, where (c) clergy is taken away from the offence, and where from the person offending, and in this case the penalty is confined to the person actually doing the fact; he answered, that the said cases being cases of life, the judges in favour of life construed the statutes tenderly; otherwise it seems absurd, to take away clergy from him who was upon the top of the ladder, and give it to him that was at the bottom; for if both had entered the room, and one of them had had the money in his custody at the request of the other, both of them would have been deprived of their clergy. And as to the case of *Page v. Harwood*, he said, that it seemed to him, that the offence consisted in the manner of doing it, because the Scots carried short daggers, and frequently upon differences arising at table, &c. stabbed others unprovided. But in the said case if A. had given the dagger to B. it seems, that B. would have been within the act. But (by him) the said resolutions being in cases of life, they will not be rules, to govern cases of smaller crimes. He concluded, that since in cases of all penal laws, as in those which make felonies, aiders and assistants are included, *a fortiori* it shall be accordingly in

Rast. tit. Forest

(a) Acc. Fost.
125, 126. vide
Fost. 361, 362.(b) Acc. 4 Bl.
Com. 36.(c) Vide 1 Bl.
Com. 88.

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Penal statutes
are to be con-
strued according
to the letter, and
not according to
equity, acc. 1
Bl. Com. 33.

Indictment
against abettors.

Indictment
against accesso-
ries.

A statute which
takes away
clergy from
aiders and abettors
does not take it
away from ac-
cessories.

cases of trespass, where such persons are principals, and where the law not being so penal, there is not so much reason to make a strict construction.

But *Holt* chief justice delivered his opinion, that the conviction was not good within the statute, and therefore that it ought to be quashed. For (by him) this is a penal statute, and therefore ought not to be construed by equity; but in making construction one must adhere to the letter, and one cannot extend it to facts equally criminal with those specified in the letter, if they are not contained in it. That this act is penal, appears by the penalty inflicted by it, by the subjecting of offenders to a new method of prosecution before a private jurisdiction contrary to the ancient liberties of *Englishmen* confirmed to them by *Magna Charta*, to be tried by their peers. Now this act does not inflict any penalty upon the confederates concerned in the offence. It is true, the preamble recites, that there were combinations, &c. but the enacting part of the statute does not inflict any penalty, but has made the offence very penal to the actors, perhaps by reason of these confederacies. But since the act has not inflicted punishment upon them, we ought not. For one may imagine with great reason, that since the statute mentions confederates, and does not inflict punishment, that it did not intend that they should be punished, but only the actors. The words of the act are, aiders and assisters therein. Now that is the actors themselves; and if the act had intended confederates, it would have said thereto. A man who provides a horse to rob a park, is an aider of the fact, but not in the doing of the fact. In an indictment against the abettor they always say, that he was *praefens confortans et auxilians*, &c. but in the indictment of the accessory they say, that he before the fact *consuluit, mandavit, procuravit, et abettavit*; or that he after the fact *recepit, auxiliavit, et confortavit*; and by the first they mean aiders and assisters; therefore if a statute takes away clergy from aiders and abettors, yet accessories shall have their clergy. See this difference in this indictment of an abettor and an accessory, *Dier*, 186.

Objection. That this offence is of an inferior nature, and therefore all are principals.

Answer. If the penalty had been inflicted upon all the trespassers, it had included all, because all are included within the denomination of trespassers. But here the penalty is inflicted upon persons by a particular description; and that is the true reason of the cases adjudged upon the statute *de malefactoribus in parcis*, because the penalty is there inflicted upon the trespassers in parks, &c. which comprises all. But if the said statute had imposed a

penalty

penalty upon the hunters and chasers, &c. or any other offender by particular description; no body had been within the said statute, but those particularly described. And he relied strongly upon the case of *Evans* and *Finch*, as strong in point, which he had seen upon the roll; and he put it at large as it is there, which agrees with the report of it in *Cro. Car.* 473. *Evans* went up a ladder to the window of Mr. *Audley's* chamber, and broke it and took out 40 l. *Finch* stood watching at the foot of the ladder, and assisted the doing of the felony; it was held, that *Finch* should have his clergy notwithstanding the 39 E. c. 15 which takes away clergy from men convict of the felonious taking of goods, &c. of the value of 5 s. &c. out of any mansion house, &c. no person being in it. Now *Evans* and *Finch* were principals in the felony; but because clergy was not taken away from the offence, but from the person taking, &c. the statute was restrained to the letter, viz. to the persons actually taking. But if clergy had been taken away from the offence, as in case of robbery upon the highway; he who stood at the end of the way to watch, shall not have his clergy, no more than he who actually did the robbery.

Objection. If a fact, which at common law was but trespass, be made felony; or if felony be made treason; the procurers are felons or traitors: and by parity of reason they ought to be included within this law.

Answer. That in the cases cited the nature of the crime is altered, and it is made a crime of another species; and therefore the persons concerned in it cannot be trespassers or felons, but felons or traitors. He cited also the case of *Page* and *Harwood*, as a case founded upon the same reason as that of *Finch* and *Evans*, and corroborating it, Therefore the statute in the present case describing particularly, what persons shall be punished, viz. coursers, hunters, &c. it shall not be extended to any person, who cannot be comprised within the description, within which (as is aforesaid) the defendant is not. He was of opinion, that the conviction ought to have been quashed. But by the opinion of the other three judges it was confirmed.

Foxworthy's Case,

S. C. 7 Mod. 153, Salk. 500. Holt 521.

If a man is attainted of felony and pardoned on condition of transporting himself within a limited time, his creditors shall not be permitted to charge him with civil actions, vide 1 Will. 127.

FOxworthy being attainted of felony, was brought into the king's bench, in order to plead a pardon granted him by the queen, upon condition that he should go beyond the sea within a time prefixed, and there abide, &c. And after allowance of pardon, the creditors of Foxworthy moved the king's bench, that they might have leave to charge him with civil actions, as in *custodia marescalli marescalciae*. But the motion was denied by the court, because it would defeat the effect of the queen's pardon, by rendering Foxworthy incapable of performing the condition of going beyond the sea; and if he had not been pardoned, the attainder would have continued, and Foxworthy had been hanged; and there is no reason, why the pardon should put the creditors in a better condition than they would have been without it, to the prejudice of the party for the benefit of whom it was granted.

Regina vers. Chalice, mayor of Thetford.

S. C. Salk. 192. 3 Salk. 103. Holt 171.

A corporation's return to a mandamus need not be sealed with the common seal.

AMandamus was directed to the corporation of Thetford, to command them to restore an alderman. To which a return was made in the name of the corporation, but not under their common seal, nor under the hand of the mayor. Upon which the party grieved, having brought his action for a false return, and fearing that he should not have sufficient evidence, to prove that this return was made by the corporation, moved by Mr. Sloane (who promoted this dispute, the success of his election to be burgess there depending much upon it) the last day of this term, that this return should not be received without the seal of the corporation, or a signing by the mayor. But it was denied *per curiam*. For upon search of precedents, there are many returns made by corporations as here. And *per curiam*, the seal of the corporation is not necessary to be affixed; because this act being upon record will bind the corporation, though not sealed with their common seal; *contra* of acts done by them *in pais*. The city of London every year make a warrant of attorney for the city in the king's bench; without signing or sealing it. And if an action be brought against the corporation, they will be (a) estopped to say, that this was not their return, because it is said, *Responsio majoris*, &c. upon record. They held also, that the mayor is not obliged to subscribe his name; for at common law no officers were obliged to sign their returns. The statute of York 12 Ed. 2. §. 1. c. 5. obliges sheriffs, to sign their returns; but it does not extend to any other

Or signed by the head of the corporation, vide Skinn. 368.

(a) R. acc. Skinn. 368.

other officers. And if the mayor procure a false return to be made, it will be sufficient evidence against him, that the *mandamus* was delivered to him, and that the *mandamus* has such a return made; and that will be presumptive against him, that he made that return, unless he shews the contrary. For the mayor, or any other member of the corporation, or other, who shall procure a false return to be made, are liable in their private capacity. See *Enfield v. Hills*. 2 Lev. 236.

REGINA
v.
CHALICE.

Bennet *vers.* Purcell.

Intr. Mic. 1
Ann. B. R.
Rot. 313.

Pleadings post vol. 3. p. 14.

IN case upon several promises brought against the defendant by the name of *Tobias Purcell armiger*, the defendant (a) pleaded in abatement, that *Tobias Purcell versus quem billa exhibitæ est per nomen Tobiae Purcell armigeri* is a gentleman, and not esquire. The plaintiff replied, that the defendant *habitus et reputatus fuit* as well an esquire as a gentleman; and then he goes on with a long history, that he was an esquire *tam ratione dignitatis suæ et parentelæ sed præsertim dignissimæ occupationis, &c.* To which the defendant demurred. And Mr. Broderick for the defendant argued, that the plaintiff ought to have replied positively, that the defendant was an esquire, and not a gentleman; and that the alleging it with a *habitus et reputatus fuit* was not good, because the addition ought to be the true addition, and not maintained with a *habitus et reputatus, &c.* only. And Powell justice seemed to be of that opinion. But Holt chief justice held, that in these cases the addition was only a description of the person; and common reputation was sufficient for it, the suit being by bill. But it would have been otherwise upon original, upon which process of outlawry lies; because the statute of 1 H. 5. c. 5. requires an addition in such case. And judgment was given, that the defendant answer over.

In an action by bill if the plaintiff gives the defendant one addition, and he pleads a misprision of addition, the plaintiff may reply that he had by reputation the addition mentioned in the bill.
26 H. 6. 54.
11 H. 6. 11.
pl. 25
19 H. 6. 51.

(a) Vide 12 Mod. 217.

Odes *vers.* Woodward. Ante 766.

UPON the report of Mr. Clerk the secondary, this case appearing to be, as was said before, 766. Mr. serjeant Hooper, &c. moved the court, that this judgment might be vacated; 1. Because by the death of Dr. Woodward the authority was revoked, and so there was no warrant, to enter this judgment. 2. Because since now the statute of frauds, 29 Car. 2. c. 3. has directed, that the

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day of the signing of the judgment shall be entred upon the margin of the roll, it will appear upon the record, that the judgment was signed after the death of the defendant and therefore cannot relate to the foregoing term. *Sed non allocatur.* For, *per curiam*, as to the objection of the revocation of the authority; a man, after he has given a warrant to enter a judgment, cannot revoke it, by the course of the court; and if he endeavour to revoke it, yet notwithstanding the court of king's bench will give leave to the plaintiff, to enter the judgment. And as to the objection of signing, &c. that will not alter the case; because the judgment, notwithstanding the statute of 29 Car. 2. will be a judgment of the preceding term; though it will not affect purchasers, but from the signing. And they held, that the practice, to enter judgments in a vacation as of the term precedent, is undeniable, and they will be good judgments of the precedent term. As if *A.* recovers judgment against *B.* *B.* dies in the vacation within the year; at the end of it *A.* may sue a *fieri facias* as of the precedent term, and (*a*) levy the goods of *B.* in the hands of his executors. So if a fine be acknowledged before commissioners in the country in the long vacation, and before the next term the consor dies; though no writ of covenant was sued, nor king's silver entred; yet the common pleas will permit the consor to enter the fine as of the *Trinity* term preceding. But in this case upon inquiry it appeared, that the roll upon which the judgment was entred, was not brought in to the office till after the esoin day of the subsequent term: and for (*b*) that reason the court refused to permit the roll to be filed, since purchasers or others might be prejudiced by it. And they held, that by the course of the court all rolls of the former term ought to be brought into the office before the esoin day of the subsequent term; and ought to be bound in the bundle of rolls of the former term; and that is the reason, why all acts before the esoin day of the subsequent term are looked upon as the acts of the term precedent. And a roll cannot be brought in and filed with *post terminum* without leave of the court.

(*a*) According to the report in Salk. 87. 3 Salk. 116. the judgment was not docketed, and that was one of the reasons why the court refused to permit the filing of the roll.

Wenmouth *vers.* Collins.

A prohibition shall not be granted to a suit in the spiritual court for brawling and striking in the belfrey upon a suggestion that the party went thither as a peace officer to suppress a riot.

MR. Robert Eyre moved, to have a prohibition granted to the ecclesiastical court, to stay a suit there against *Wenmouth*, for brawling in the belfrey, and striking a man there, upon suggestion of the statute of 5 & 6 Ed. 6. c. 4. and alleging, that all statutes are construed by the common law, and that *Wenmouth* came there as mayor to suppress a riot. But the court (*absente Holt* chief justice) denied a prohibition, because this offence was consuable in

the ecclesiastical court before this statute, *ratione loci*; and that the statute, though it provides a penalty, does not alter the jurisdiction.

WENMOUTH
v.
COLLINS.

Hollingshead's Case.

S. C. Salk. 351.

Hollingshead was brought into the king's bench upon a *habeas corpus*; and the return was, that she was committed by commissioners of bankrupts, for refusing to be examined by them; and the conclusion of the warrant of commitment was, that she should remain in custody, until she should be otherwise discharged by due course of law. And by reason of this conclusion the court held the commitment to be ill, and discharged the defendant; because the power given by the statute 1 Jac. 1. c. 15. is to commit the party, until he submit himself to the commissioners, and shall be by them examined. And there is no mention made, of being discharged by due course of law. And for this exception *Bracy*, committed for such account, was discharged. *Mich. 8 Will. 3. 1696. Ante, 99.*

If commissioners of bankrupts commit a party for refusing to be examined, they cannot direct that he shall remain in custody until he shall be discharged by due course of law. D. acc. ante 100. vide Carth. 152, 153. post 1105.

Geery *vers.* Hopkins.

THE plaintiff brought an action against the defendant for money received to his use, and upon other promises. And the question arose upon the acceptance of one of Mr. *Shepherd* the goldsmith's notes, who was become bankrupt, &c. And notice for trial being given, Mr. *Raymond* moved, 1. For a *habeas corpus ad testificandum*, to bring *Shepherd* out of the *Marshalsea*, where he was in execution, to *Guildhall*; which was granted. 2. To have a rule, that the cash-book of the old *East India* company, kept by their treasurer, and also their transfer-book, and also a note of acceptance of 1000*l.* bank-stock signed by the defendant, kept by the accountant of the company, should be brought to the trial at the plaintiff's expence. And it was granted. For *per Holt* chief justice, if the bank deal in transfer of their stock, and that cannot be done by any other means than by entry made in their books, it is very reasonable that they should be produced for the benefit of the party, as well as corporation books, &c.

A man in execution in the king's bench may be brought up to *Guildhall* to give evidence by an *habeas corpus ad testificandum*.

The *East India* company may be compelled to produce at a trial their cash and transfer books, S. C. 7 Mod. 129. and any

notes they may have of the acceptance of bank stock signed by the party applying for the production.

Bird *vers.* Major.

UPON an issue directed in chancery, to be tried before the lord chief justice *Holt* for his opinion, the case upon the trial before him at *Guildhall* the sitting after

Persons liable to be bankrupts who were not before within the bankrupt laws, they may be made bankrupts in respect of any acts which were before acts of bankruptcy. A man is not liable to be a bankrupt in respect of a share which he has in the stock of a private trading fraternity.

If a new act of parliament makes a description of

this

BIRD
v.
MAJOR.

this term appeared to be thus. A scrivener, who was not liable to be a bankrupt before the statute of 21 Jac. 1. c. 19. committed an act, which was made an act of bankruptcy by the statute of 1 Jac. 1. c. 15. viz. absconding, &c. and he had also a share in the stationers company. And the question was, whether he was not a bankrupt by that? And *Holt* chief justice held, that since the 21 Jac. 1. c. 19. had made a scrivener liable to be a bankrupt, it had subjected him to all the old acts, which by the former statutes made a man a bankrupt, as well as to the acts mentioned in the statute of 21 Jac. 1. c. 19. But as to the share in the stationers company, he seemed to incline, that that would not make him a bankrupt. See for that the 13 & 14 Car. 2. c. 24. where it enacts, that the having a share in the *East India* company, &c. will not make a man a bankrupt. And a judgment given to the contrary in 1653, was by the said act declared illegal. But the lord keeper held the scrivener to be a bankrupt by both the points. Upon the importunity of the counsel it was reserved as a case, as to both points, for the further consideration of the chief justice.

Puered *vers.* Duncombe.

On a trial in an action on a bond, if the bond was admitted by the pleas, the plaintiff need not prove the specification.
Vide ante 324.

DEBT upon bond of 1400*l.* The defendant pleaded the statute of usury. And upon the trial of it, issue being joined before *Trevor* chief justice of the common pleas, the sitting after this term at *Westminster*, the question was, whether the plaintiff should be compelled to give in evidence a specification? And this point was reserved for his opinion at his chambers. Where afterwards it was argued by serjeant *Hooper* for the plaintiff, and by Mr. *Raymond* for the defendant. And he held clearly the negative: because the bond was admitted by the plea; and where the party is not bound to give the bond in evidence, he is not bound to give in evidence the specification. And the *possession* was delivered to the plaintiff.

Easter Term

2 Annæ reginæ, B. R. 1703.

West *vers.* Sutton.

THE plaintiff sued a *scire facias* upon a judgment in affize obtained against the defendant, for the office of marshal in the king's bench. The defendant pleaded in abatement, that the plaintiff was an alien enemy, &c. The plaintiff replied, that he was *indigena*, born at *Westminster*, *et hoc paratus est verificare*. The defendant demurred, and shewed for cause, that the plaintiff ought to have concluded his replication to the country. And of that opinion was *Holt* chief justice, because every plea concerning the person pleaded in abatement, is triable where the action is brought; but where such plea is pleaded in bar of the action, the (a) *venue* shall be alledged, and it shall conclude with an averment; because such plea is not to the person, but pleaded to the right. But by the whole court the plea is ill, because this matter ought to have been pleaded in the original action. For now the plaintiff being admitted to be able to recover judgment, he cannot be disabled from having execution upon it by matter precedent to the judgment. And therefore *respondes ouster* was awarded. Then the defendant pleaded in bar to the *scire facias*, that after the judgment obtained by the plaintiff, the defendant waived the possession, and the plaintiff entered, and made a lease of it for five years to the defendant, &c. The plaintiff replied, *protestando* that he was never seised of it since the judgment; for plea he said, that the defendant always continued in possession, *absque hoc* that he waived it, &c. The defendant demurred. And adjudged for the plaintiff; 1. Because a lease made by a man before entry after recovery is void. 2. This being an an office, the demise by parol is void. Mr. *Montague* for the defendant took exception to the writ of *scire facias*, because it being grounded upon a judgment in an affize, which is an original, ought to have been re-

Intr. Hyl. 7
Ann. B. R.
Rot. 504.

To a plea in abatement that the plaintiff is an alien enemy a replication that he is *indigena* ought to conclude to the country.

S. C. Salk. 2.
Holt 3.

Vide post 1014.
1173, 1243,
1504. Salk.
555. pl. 8.

Such plea cannot be pleaded to a *scire facias* upon a judgment recovered by the plaintiff. S. C. Salk. 2. Holt 3. vide Cro. El. 283. pl. 7.

A man who recovers an office cannot make a lease of it before he enters upon it.

Vide ante 729, and the books there cited.

An office cannot be demised by parol. vide 29 Car. 2. c. 3.

A *scire facias* upon a judgment by original may be made returnable on a day certain. R. cont. post 1417.

(a) S. P. Salk. 2. Holt 3. D. acc. post 1173, 1243. vide post 1014. 1504. Str. 9.

WEST
v.
SUTTON.
Scire facias upon
a judgment in

turnable *ubicunque*; whereas this was returnable at a day certain. But *per Holt* chief justice, it is good the one way or the other. Judgment for the plaintiff.

affize returnable at Westminster at a day certain, is good.

Regina vers. Summers.

S. C. Salk. 55. 3 Salk. 104.

UPON a motion to aggravate the fine after the defendant, being convict of a riot and trespass, had been before the master, and costs had been taxed, the court said, that this motion was not regular, after the defendant had been before the master, and the prosecutor had been considered by him in costs. And therefore they said, that if Mr. *Eyre*, who moved it, insisted to have the fine aggravated, they would set aside the costs taxed.

Adams vers. Terre-tenants of Savage.

Pleadings and special Verdict, Lill. Entr. 398.

Intr. Mich. 13
W. 3. B. R.
Rot. 318, or
168.

If the owner of an estate conveys it to trustees by lease and release to the use of himself for years, remainder to trustees for years, remainder to the heirs male of his body, remainder to his own right heirs, no use can result to him for life. S. C. Salk. 679. vide *Fearne* 3d Ed. p. 40. Com. Uses. k. 7. 2d. Ed. vol. 5. p. 629.

A *Scire facias* was sued by the plaintiff as administrator to *J. S.* upon administration granted to him by the archdeacon of *Dorset*, upon a judgment recovered by the intestate against *Savage* in this court. And the issue after pleading was, whether *Savage* was seised of the lands, &c. in fee? Upon which the jury found a special verdict, that *Savage* being seised in fee, conveyed the lands by lease and release to trustees and their heirs, to the use of himself for ninety-nine years, if he should so long live, remainder to the trustees for twenty-five years, remainder to the heirs male of his body, remainder to his own right heirs. And the question was, if *Savage* during his life, not having heirs male of his body, should have a use result to him for his life, and so become tenant in tail in possession; or if no use could result, and then there being no freehold to support the contingent remainder to the heirs male of the body of *Savage*, the said remainder would be void, and *Savage* seised in fee as before. And this was argued by Mr. *Eyre* for the plaintiff, and by Mr. serjeant *Darnall* for the defendant, *Hilary* term last, and this term. And the court held, that no use could result to *Savage* during his life, and therefore the remainder to the heirs male was void, and *Savage* seised in fee. And their reasons were, because the limitations to himself for ninety-nine years, and to the trustees for twenty-five years, and the heirs male, were new uses and new estates. As if a man by lease and release, or by covenant to stand seised, limit the use to himself for life, or in tail, these are new estates, and not parcel of the old estate, ac-

An estate for 99 years with a remainder for 25, will not support a contingent remain-

der. S. C. Salk. 679. Vide *Fearne* 3d Ed. 40. 210. ante 203. 313. A judgment is bonum notabile in the diocese in which it is given. S. C. Salk. 40. 6 Mod. 134. The courts will take notice of the limits of a diocese. S. C. Salk. 40. 6 Mod. 134. An administration granted by a peculiar, when there is bonum notabile within the province out of the peculiar is void. S. C. Salk. 40. 6 Mod. 134. At least an administrator cannot sue upon a judgment, unless his letters of administration are granted by the person within whose jurisdiction the judgment was given. S. C. Salk. 40. 6 Mod. 134.

cording

according to 7 Co. 13. b. *Englefield's case*. And where in such case upon a conveyance such uses are limited, as (supposing the limitations to be good) would pass the whole estate, (a) there no use will result contrary to the express limitations of the party. But if the limitations are void, the conveyance of necessity will fail. If a man seised in fee convey his estate by lease and release to the use of himself for life, remainder to trustees for their lives, remainder to the heirs of his body; he hath an estate tail in him, but he is but tenant for life in possession: otherwise if there had been no intermediate estate in the trustees for their lives. And in the former case, if a man makes a feoffment, it is no discontinuance, but only divests the estate. And for the same reason in this case, where the first limitation is only for years, the remainder to the heirs of the body of the tenant for years is a contingent remainder, and void. These are the reasons of the chief justice *Holt*.

And *Powell* justice said, that there was a difference, where the limitation was upon a covenant to stand seised, and where upon a lease and release. For where the limitations are to take effect out of the estate of the covenantor, there if the limitations were such as could not take effect immediately, or not till after the death of the covenantor, as in the case of *Pybus v. Midford*, 2 Lev. 75. there the law may mould the estate remaining in the covenantor into an estate for life: but that cannot be where the limitations are to take effect out of the estate of the trustees for want of a limitation, much less against an express limitation. And therefore (by him) if there had been an express limitation in the case of *Pybus v. Midford*, limited to the covenantor, the judgment would have been otherwise. And for these reasons the whole court ordered last *Hilary* term, that judgment should be entred for the plaintiff, unless cause should be shewn to the contrary the first day of this term. And the first day of this term *Darnell* queen's serjeant shewed for cause, that the plaintiff could not have judgment, because it appeared upon the *scire facias* that he was not intituled to it; because the administration was granted to him by the archdeacon of *Dorset*, and therefore the grant of it was void; for the judgment of this court, upon which the *scire facias* is founded, is *bona notabilia*. 2. If it will not make *bona notabilia*, yet this grant of administration will be void *quoad* this judgment, because it lies out of the limits of the jurisdiction of the archdeacon of *Dorset*. Against which it was urged by Mr. *Eyre* for the plaintiff, that this court cannot take notice of the boundaries of dioceses; and it may be, that this court is within the archdeaconry of *Dorset*, for that archdeaconry may be within the

ADAMS
v.
Terretenants of
SAVAGE.
(a) Vide Fearn
3d Ed. 40. Com.
Uses. k. 7. 2d.
Ed. vol. 5. p.
629.

Difference between a limitation upon a covenant to stand seised, and upon a lease and release.

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SAVAGE.

the diocese of *London*; and this court will not intend the contrary, since the contrary does not appear to them. But *per Holt* chief justice, this court will take notice of the limits of ecclesiastical jurisdiction, which is part of the law of the realm; under which we live; and consequently it will take notice, that a judgment of the king's bench is not within the jurisdiction of the archdeacon of *Dorset*. And for this reason the whole court held, that judgment ought to be given for the defendant.

Regina *vers.* Watſon.

Pleadings and verdict, post vol. 3. p. 18.

Vide ante 804.

THE defendant *Watſon* was indicted, for that that he was such a day possessed of a house in *Lynn Regis* adjoining to the common bridge; that he ought to repair the said house *ratione tenuræ*; but that he permitted it to be so much out of repair, that it was ready to fall upon the queen's subjects passing over the said bridge, &c. Upon not guilty pleaded, the jury found a special verdict; that *Watſon* was but tenant at will of the said house, and concluded with a special conclusion, praying the judgment of the court, whether he were obliged *ratione tenuræ*, to repair the house. And after argument by Mr. *Mountague* for the defendant, and by Mr. *Weld* for the queen, it was adjudged, that the defendant, as tenant at will only, ought to repair the house, so that the public be not prejudiced by the want of repairs; but that he is not compellable to repair as to his landlord. And that is shewn well enough in this indictment. The only objection is, that he is not chargeable to repair *ratione tenuræ*; but though that is improper, yet it shall be intended of the possession, and not of a service. And judgment was given against the defendant.

Turner *vers.* Turner.

Intr. Mich. 2
Ann. B. R.
Rot. 207.

S. C. Salk. 279. Holt 156.

A plaintiff shall not have leave to discontinue after a peremptory rule for judgment against him.

Vide Salk. 278.
pl. 4. Bl. 815.
1 Lev. 48.

DEBT upon bond. The defendant pleaded the composition act. And after demurrer joined, exceptions were taken to the plea, and all over-ruled; upon which judgment, *nisi*, &c. was given for the defendant. Whereupon Mr. *Montague* moved to have leave to discontinue; and cited for it 1 *Saund.* 39. 2 *Saund.* 73. and 1 *Saund.* 23. leave given to discontinue after argument of the counsel at the bar, and of the judges upon the bench. But the motion was denied, *absente Powell* justice. Because after a rule for judgment *nisi*, &c. and then a peremptory rule

rule for judgment (as was in this case) *Holt* chief justice said, he never knew leave given to discontinue. And the rule in the old books is, that if after the exception stirred, the court has pronounced their opinion, and yet the plaintiff demurs; he does it at his peril: and if the exception be over-ruled, (a) judgment shall be given against him.

TURNER
v.
TURNER.

(a) Sed vide 1
Lev. 192. 298.

Morris *vers.* Sir Richard Reynolds.

S. C. but not so fully *Salk.* 73. *Holt.* 81.

SErjeant *Darnall* moved, that an award made by arbitrators chosen by the consent of the parties at *nisi prius* at *Guildhall*, and whose submission was made by roll of court there, and afterwards the said rule made a rule of the king's bench, might be set aside, upon *affidavit* of the mismanagement of the arbitrators, and that they refused to hear what the defendant could say, after they had heard the plaintiff. *Holt* chief justice opposed this *totis viribus* as contrary to all practice, that he had known in his experience; which was, that in such case the integrity of the arbitrators (whom the parties by consent have chosen to be their judges) shall never be arraigned, no more than the integrity of any other judge. But *Powell*, *Powys*, and *Gould*, justices said, that it was abominable, to give any countenance to such proceedings; and that therefore they ought to be punished, because they abused the office of a judge. And a rule was made that they should attend. And the examination was made in court by *affidavit* of all their proceedings. And upon that great mismanagement appeared to be among them.

Upon affidavits that arbitrators appointed by submission under a rule of court had been guilty of misconduct, and refused to hear the defence after hearing the plaintiff's case, the court will compel them to attend and examine their proceedings, vice *Salk.* 71. pl. 4. *Str.* 301. 3 *Atk.* 644. 3 *P. Williams*, 361.

Regina *vers.* Cave.

MR. *Broderick* moved, that an indictment found against the defendant, for speaking these words of the prosecutor *John Bradshaw in audita quam plurimorum, viz.* That he had made an assault upon *Priscilla Tinsdale*, and had carnally known her, without the consent of the said *Priscilla Tinsdale*; with intent to procure money from the said prosecutor; should be quashed: because it was not matter, for which an indictment lies. And it was quashed accordingly.

Regina *vers.* Kime.

S. C. Salk. 357.

AN indictment was found against the defendant, for not working in the repair of the highways in *London*, upon the 22 & 23 *Car. 2. c. 17. f. 6.* Upon not guilty pleaded, he was found guilty. And it was moved in arrest of judgment, that it was said in the indictment only, that six days were appointed between such and such days for the work, but the particular days were not mentioned. And for this reason the court held the indictment bad, for the appointment ought to be of such days in particular, viz. the twentieth of *April, &c.* and notice ought to be given accordingly; otherwise the appointment is ill. And though it was objected by serjeant *Darnall*, that it was aided by the averment in the indictment, that the defendant did not come upon any of the days; yet it was over-ruled, because if the appointment was ill, the defendant was not obliged to come at all. And the judgment was arrested.

Regina *vers.* Chaffey.

Justices of the peace cannot make an order for parish officers to seize of the goods of the putative father what they (the officers) shall judge proper, to secure the parish, vide 13 & 14 *Car. 2. c. 12. f. 19.*

Justices cannot compel the putative father of a bastard child to give security to pay the money ordered by them for maintenance, until after he has omitted paying some part of it according to the order, vide 18 *Eliz. c. 3.*

If an order of filiation is removed into the king's bench and quashed, the court will not compel the re-

puted father to give security to appear at the sessions, S. C. 3 Salk. 66. But if the original order remains at the sessions, and an order of sessions confirming it is quashed, the court of B. R. will compel him to give such security, S. C. 3 Salk. 66.

Several orders made by the justices of peace in *Wilts*, against the defendant, for being the putative father of a bastard child, were removed into the king's bench by *certainari*. And Mr. *Broderick* moved, to quash one of them, which was made by the justices, that the churchwardens and overseers of the poor should seize of the defendant's goods, what they should judge proper, to secure the parish from the maintenance of the child; because by the 13 & 14 *Car. 2. c. 12. f. 19.* they have only authority to make an order to empower the churchwardens and overseers, &c. to seize, what the justices should judge proper, and not what the churchwardens, &c. should judge proper, &c. And for this reason it was quashed. Then an exception was taken to the original order, because it ordered, that the defendant should give security for payment of the sum by them imposed for the maintenance of the child when it did not appear, that the defendant had disobeyed the order in point of payment. And by 18 *El. c. 3.* an order for security cannot be made, till after contempt. And for this reason the order was quashed as to that part, and was confirmed as to the residue. And *per curiam*, when an order is confirmed in this court, an attachment lies for non-performance of it; and therefore this court will not take security of the party for performance of it. But if the original order had been at the sessions, not removed hither, the court would have taken security of him, to appear there.

Lapiere *vers.* Sir John Germain knight and baronet and the duchefs of Norfolk.

S. C. 3 Salk. 235.

IN case against the defendants, Sir John in the declaration was sued only by the title of baronet. The defendant pleaded in abatement, that he was knight and baronet. The plaintiff replied that he was baronet *tantum*, and offered issue; which was joined. And thereupon Mr. Raymond moved, to have leave to amend upon payment of costs, and to make the declaration [knight and baronet] all being in paper. But it was denied, because there was nothing by which this amendment could be made, the *latitat* not being so. And though all was in paper, yet the defendant had taken advantage of this slip. And therefore the court would not make a rule for the amendment. Then Mr. Raymond was informed, that the *latitat* was knight only; and therefore he prayed leave, to make the declaration agreeable to the *latitat*; urging that the omission of baronet in this case, being a suit by bill, was not material; because baronet is not part of the name, as (a) knight is. And (b) suits by bill are not within the statute of additions. And Powell justice seemed to be of that opinion, saying that the books warrant such a difference. And he cited 32 H. 6. 30. a. which says, that a baron has no need to be named but as knight or esquire in a writ. Holt chief justice agreed with the said case, but said that the reason of it was, that then barons were so by tenure, and were summoned to parliament by writ; and were not then created by letters patent as at this day; but that then the law was otherwise of titles of dignity, as of earl, which was part of the name. And now it is otherwise of barons, when they are created by letters patent; for now it is a title of dignity, and parcel of the name. The same law of baronet, which is made a title of dignity by letters patent, and therefore a baronet ought to be named so in all judicial proceedings, otherwise they will abate. And it is no objection, that it is a new title; for so is viscount, begun in the time of Henry 6. marquis in the time of Richard 2. and duke in Edward 3. And though they are new titles, they shall be named so in all proceedings against them. Then he moved, that the bill might be abated for their own expedition. And it was granted.

A title of dignity is part of the name of the person who has it, S. C. Holt 493. Salk. 50. acc. ante 303. and see the books there cited post 1014.

And he must be described by it even when defendant in a suit by bill. Salk. 50. vid. post 1014.

The title of baronet is a title of dignity.

In a suit by bill no amendment can be made in the bill as to the name of the defendant after he has pleaded a misnomer in abatement, unless the amendment is warranted by the process upon which he was brought into court. S. C. Salk. 50.

(a) Vide ante 303. and the books there cited. (b) R. acc. Salk. 7. pl. 1. 11 Mod. 212. Semo. acc. ante 849.

Tonkin *vers.* Croker.

I
nrr. Mich. 12
Will. 3. B. R.
Rot. 26.

S. C. Lutw. 1215. Holt. 452. Salk. 604.

Pleadings and
verdict Lutw.
1211. post vol.
3. p. 224.

A court baron
must be held
from three
weeks to three
weeks, sed vide
Co. Cop. 50.
A court which
is stated to be
held otherwise
shall be intenced
to be a customary
court, tho' it is
called in the
statement "the
court of the
manor."

Such court may
by custom be held
before the stew-
ard.

The lord may
avow distraining
for suit to it
without shewing
a prescription for
the court or a
custom to distrain
for the suit.

A manor cannot
exist with out two
free suitors, acc.
2 Roll. Abr. 121.
F. pl. 1. 122. F.
pl. 2. 15. Vin.
112. pl. 1. 2.
Co. Cop. 49. 51.
2 Bl. Com. 90.
97. D. acc. 3 T.
R. 447.

After a jury has
in terms decided
the issue referred
to them, they
cannot state any
additional facts.
Vide Com. Dig.
Pleader. S. 28.
2d Ed. vol. 5.
p. 163.

ERROR C. B. Tonkin brought replevin of a brass pan taken by the defendant in a place called *The Kitchen, apud parochiam St. Agnes in Cornwal.* The defendants as bailiffs of *William Mobun* esquire make consufance of the taking, &c. for that that they say, that before the time, &c. one *Hugh Tonkin* esquire was seised of one messuage, &c. whereof the place, &c. is, and the same time when &c. was parcel, in fee; and that he held the said messuage, &c. of the said *William Mobun ut de manerio suo de M.* by fealty, rent of 4s. per annum, necnon per servitium faciendi sectam ad curiam manerii praedicti bis per annum apud manerium illud tenendam, &c. whereof the said *William Mobun* was seised, &c. and for 4s. for the rent aforesaid for one year ended *Michaëlas 5 Will. & Mar.* arrear, and for that that the suit of court at the court of the said *William Mobun manerii sui praedicti* within the manor aforesaid the twenty-fourth of *October, 5 Will. & Mar.* for the manor aforesaid held *suit infecta*, they make consufance, of the taking, &c. The plaintiff in bar of the consufance protesting that *William Mobun* was not seised of the said services, &c. for plea saith, that the said *Hugh Tonkin* held the said messuage &c. of the said *William Mobun ut de manerio suo de M. praedicto per redditum quatuor solidorum, &c. absque hoc* that he held by the rent of 4s. necnon per servitium faciendi sectam ad curiam manerii praedicti bis per annum apud manerium praedictum, prout it is alledged in the consufance, &c. And to this bar the defendants replied, and maintained their consufance, and offered an issue. And the plaintiff joined issue, and at the trial at *nisi prius* the jury find a special verdict that long time before the time, &c. the manor of *M.* within mentioned was an ancient manor, whereof the said *William Mobun* is, and at the time in which, &c. was seised in fee; and that time whereof, &c. there was an ancient court held before the steward of the manor *bis per annum, et habuit separales liberos tenentes, Anglice* freehold tenants, *et separales feitores, Anglice* suitors, who did suit at the court aforesaid of the said manor; and that the said *Hugh Tonkin* and all his ancestors were freehold tenants of the said manor, and held the said messuage, &c. of the said *William Mobun* and his predecessors, lords of the said manor of *M.* by fealty, and 4s. rent every year at the feast of *St. Michael* the archangel *solvendum, necnon per servitium faciendi sectam ad curiam manerii praedicti bis per annum apud manerium illud tenendam prout in advocationse infra scripta interius mentionatur*: and the jurors farther find, that within

the

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the said manor of *M.* there is, and for twenty years last past there hath been, *unius solummodo liber tenens, viz.* the said *Hugh Tonkin*; but that *infra scripto tempore quo, &c.* nec non time whereof, &c. there were and now are several customary tenants, &c. of the said manor: then they find, that for rent and services in arrear the defendants as bailiffs of the said *William Mohun* at the time in which, &c. took, &c. *sed si super totam materiam prædictam* the aforesaid *Hugh Tonkin* held, &c. by fealty, rent, and suit of court, &c. the said jurors know not, but pray the advice of the court, *et si, &c.* And after (a) several arguments at the bar in *C. B.* judgment was given for the defendants; upon which a writ of error was brought by the plaintiff, and the general errors were assigned. And it was argued at the bar several times by *Danall* king's serjeant, *Mr. Broderick* and *Mr. Raymond*, for the plaintiff in error, and by *Mr. Cooper* king's counsel, *Mr. Chesbire* and *Mr. Parker*, for the defendants in error. And the first objection was, that the tenure found in the verdict varies in its nature, from that which the consuance mentions, and consequently that the verdict does not maintain the issue; and therefore the judgment, being given for the defendants, is erroneous, and ought to be reversed. And the reasons upon which the plaintiff's counsel founded this objection were, because the suit to the court mentioned in the consuance must be intended to be suit to the court-baron, tenure at common law; but the suit to the court found by the verdict is customary tenure, because it is suit to the customary court. *Curia manerii* must be intended to be a court baron. It is the particular stile of the court. 4 *Inst.* 268. *Co. Lit.* 58. It is the description of a court-baron in the writ framed upon *Magna Charta* for assueing amercements imposed in a court-baron. *F. N. B.* 76. *d. quod ipsos tenentes cum in curia ejusdem manerii in misericordiam inciderint, &c.* and this is the court, which is incident of common right to all manors. Farther if the court mentioned in the consuance shall be taken to be another court than the court-baron, *viz.* a customary court; then the consuance is ill, for want of making title to it by prescription. For the law takes no notice of any customary court, without a prescription shewn to warrant it. And the defendants cannot justify the taking of a distress for suit to such a court, without a custom also shewn to distrain for it. For though a distress is incident of common right to all manner of services, *Litt. sect.* 226. *Co. Lit.* 150. *b.* and consequently to suit of court; yet for suit to a customary court, distress will not be incident without a custom. And he likened it to the case of heriots, where for (b) heriot service the lord may distrain, 8 *Hen.* 7. 10. *Cro. Car.* 260. but for (c) heriot custom he cannot distrain: but may seize

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(a) Vide *Lutw.*
1215. Nely.
Lutw. 380.

(b) *Com. Dig.* copyhold. K. 21. 2d. Ed. vol. 2. p. 518. (c) *Acc. Com. Dg.* Copy. o'd. K. 25. 26. 2d. Ed. p. 520.

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(a) Vide Co.
Cop. 5th.

(b) Sed vide
Kutw. 1216.

the best beast though out of his fee. *Gouldsb.* 97. And for these reasons they argued, that this court mentioned in the conusance must be intended a court-baron; but the court found in the verdict is a customary court, and may be good by prescription, but is not the court-baron incident to every manor of common right, 1. Because it is held before the steward, whereas the (a) court-baron is held before the suitors. *Co. Lit.* 5, 8. *Cro. Eliz.* 792. 4 *Co.* 26. And as to the case of *T. Jones* 23. to the contrary, it is an obscure case, and an unnecessary resolution there. And *Cro. Eliz.* 791. *Noy* 20. *Pill v. Towers.* *Cro. Jac.* 582. *Sir William Armyne v. Appletoffe*, are exprefs, that (b) the court-baron cannot be held before the steward by prescription. 2. A prescription is found for the court found by the verdict, but a man cannot prescribe for a court-baron. It is ill pleading to do it, *Noy* 20. because it is incident to the manor of common right. 3. A court-baron must be held from three weeks to three weeks, *Co. Lit.* 58. but this in the verdict can be held but twice in the year; therefore this court in the verdict may be good by prescription; as *Co. Entr.* 118. though the court ought to be held from three weeks to three weeks; or like that in *Leon.* 216. *Lord Cobham and Brown's* case. But it cannot be a court-baron; and consequently the suit in the verdict differs from that in the conusance. It was argued farther, that if it should be admitted, that it was not necessary, to make title to the court in the conusance; yet they should have shewn some characteristical distinction, to shew that they did not mean the court-baron, otherwise it shall be taken to be the court-baron at common law, and then it cannot be maintained in evidence by shewing a customary court. For where a man intitles himself generally by common law, he cannot make it good in his replication or rejoinder by custom. As *Keilw.* 76. *A.* charged *B.* in account generally as bailiff, the evidence was, that there was a custom to elect one, &c. to serve as bailiff *ratione tenuræ*, who was to collect the rents, &c. upon demurrer to the evidence it was held, that the evidence did not maintain the declaration. And several other cases were cited, to prove the said rule, *Cro. Jac.* 551. *Loder v. Somnell.* *Co. Lit.* 304. *Dier,* 291. *Cro. Jac.* 583. 1 *Andersf.* 192. pl. 227. *Moor* 271. pl. 425. *Ewer v. Astwick.* *Moor* 679. *Gregory v. Harrison.* *Cro. Eliz.* 462. *Wells v. Partridge.* 1 *Sid.* 142. *Mould v. Wallis.* The defendant's counsel relied so much upon the finding of the verdict, that they did not regard this objection. But though the court pronounced their judgment for another reason, as shall be said afterwards, yet *Holt* chief justice, though he did not give an absolute opinion, said it seemed to him, that the avowry was well enough; because the suit claimed in the conusance, being suit to the court of the manor *vis per annum*, it shews that the suit must be intended
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suit to some other court of the manor, and not to the court-baron, which ought to be held from three weeks to three weeks; and consequently may well be intended, to be suit to the court held before the steward, and found in the verdict, and such courts to be held before the steward are good by custom. 1 Leon. 316. (And so Powell justice said that it was held by all the court of the common pleas in this case.) And such courts are held in several honours and manors at this day, to inquire of the rents and services arrear to the lord; and they are good. And this shall be intended to be such a court. And the suit to this court must be intended to be a service created by reservation upon a gift of the land by the lord to the tenant before the statute of *Quia emptores terrarum*, as 12 Hen. 7. 18. Replevin, the defendant avowed for suit to a court-leet, for that that the plaintiff held twenty acres of land, to do suit twice a year at the view of frankpledge of the defendant; and it was objected, that suit to his view of frankpledge generally should be intended suit real (which is due from the resiants only) and the plaintiff lived out of the jurisdiction of the court, and not suit-service: but the court held, that it should be suit-service; and that it was reserved upon the gift of the land, to oblige the tenant to attend there, to be sworn upon inquests to present common nuisances, &c. and the rather, because suit real, which is to be sworn to the king for his allegiance, ought to be done but once in a man's life; and therefore suit twice a year cannot be intended to be that. And here this avowry is advantageous to the tenant, because it acquits him of the service to the court-baron to be held from three weeks to three weeks. He agreed the rule, that upon a declaration grounded upon a fact at common law one cannot maintain it by replication of a custom or statute; as in covenant upon an indenture of apprenticeship, the defendant pleads infancy, &c. the plaintiff cannot maintain his declaration, by saying, that there is a custom, that infants may bind themselves, &c. But he seemed to deny the case in *Keilw.* 76. supposing that it had appeared by the book, that the defendant there had exercised the office of bailiff, &c. and then it would not have been material, by what means he had become bailiff, but he might have been charged generally. But the next day, finding that it did not appear by the book that he acted as bailiff; he declared in court, that for that reason the said case was good law, for then they ought to shew, by what means the defendant became bailiff.

Suit to be done twice a year at a court leet is suit service.

A declaration at common law cannot be made good by replication of a custom.

In account against a bailiff, if it appears he has acted, 'tis not necessary to shew how he became bail ff.

2. It was argued by the counsel for the plaintiff in error, that admitting, that the court would intend the service in the consuance, and that in the verdict, to be the same; yet it appeared by the verdict, that the manor is destroyed; and if there is no manor, there is no court; if no court, no suit can be due to it. And for this they urged, that the

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manor was destroyed, because there was but but one suitor, and the court cannot be held, but before two suitors at least. *Bro. comprise* 31. *Bro. manor* 1. 2 *Roll. Abr.* 122, 124. *Lit. R.* pl. 26. *Co. Lit.* 58. *Yelv.* 191. And the manor cannot subsist without a court-baron, because if the freeholds escheat to the lord all but one, or if he purchase all but one, the manor is extinct. That suit service cannot multiply, 2 *Inst.* 119. and if the lord purchase the intire suit of court, it is extinct. 46 *Edw.* 3. 40. 2 *Inst.* 120. That it is found positively, that there has been but one free suitor for twenty years last past; that the verdict being special shall not be aided by intendment; and therefore that it shall not be intended, that any of the other freeholds are only suspended, and that so the tenure remains, and the manor continues.

But *per Holt* chief justice there must be two suitors at least to continue the manor, for without two no court can be held. But in this case the jury have expressly found, that this was a manor. The question then will be, whether it appears to be destroyed. And (by him) it does not. For suppose, that there were two suitors, one of them makes a lease for life; the lessee for life does not hold of the lord, but of the reversioner, and he holds of the lord; and then for that time there is but one free suitor. The manor seems to be suspended *pro tempore*, but the suit-service remains notwithstanding the suspension. As where lands held by homage are granted to a corporation aggregate, the tenure remains, though (a) the corporation cannot do homage; and if the corporation grant it over, the homage (b) will revive. Farther the issue is, whether *Hugh Tonkin* held by rent, suit of court, &c. which is not confined to any time; and the jury have found expressly a time, when he held so, *viz.* before the twenty years last past. And therefore he seemed to be of opinion, that this objection would not avail here.

But against this it was also objected by the defendant's counsel, that the plaintiff had admitted this to be a manor in his bar to the consuance; and therefore that the jury could not find matter contrary to what the parties have admitted upon record, 2 *Co.* 4. *Goddard's* case, and the books there cited. 2 *Leon.* 80. 2 *Mod.* 2, 4. *Wilcox's* case. But to this it was answered by the plaintiff's counsel, 1. That the admission was only in the inducement to the traverse, which is no material part of the plea, and therefore will not conclude. 2. It is admitted but by an *ut de manerio*, &c. which is not a positive averment. 3. That the jury are not concluded from finding the truth of the fact, where it is directly within their issue, and when they cannot find the issue without consideration of it; but that the other rule is to be understood, where they find matter admitted by the parties upon the record, which is not within their

(a) Acc. Co.
Lit. 70. b.
(b) Acc. C.
Lit. 70. b.

A jury cannot find against what the defendant admits in his bar. Vide Com. Dig. Pleading. S. 17. 2d Ed. vol. 5, p. 160.

their issue, such finding is void, not because it is contrary to what the parties have admitted, but because it is not comprised in the issue. And upon search, the books cited in 2 Co. 4. will receive this answer. But that the jury may find the truth in such case, though contrary to the admission of the parties, Mr. Raymond cited 2 Brownl. 149. *Higgins v. Biddlecome*, strong in point; for there the parties admitted that Sir William L. was seised, yet the jury found expressly contrary, and held good. And Holt chief justice upon the first argument of this case seemed to incline to this opinion, but gave no opinion in it, because the whole court held, that the jury had found the issue for the defendants *in totidem verbis*, viz. that the said Hugh Tonkin and his ancestors were freehold tenants of the said manor, and held the said messuage, &c. of the said William Mobun, &c. by fealty and rent of 4 s. &c. *necnon per servitium faciendi festam adcuriam manerii prædicti bis per annum apud manerium illud tenendam prout in advocacione infra scripta interius mentionatur*; and then what was found afterwards was surplusage and idle. And therefore all the judges were clear in opinion that the judgment ought to be affirmed. And it was so. See for this last point *Cro. Car.* 75. 131, &c.

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Regina vers. Parry, Snelling & al

A Motion was made, for quashing an indictment against the defendants, for having pretended to be officers in the land bank, and for having cheated J. S. of 14 l. and for having pretended to assist him in procuring an office of messenger, whereas there was not any such office, &c. But it was denied, because it is a cheat; and the defendant, if he imagines that the law is with him, may demur.

Elwes executrix Elwes vers. Mocata.

S. C. Salk. 314.

THE plaintiff brought *indebitatus assumpsit* (a) for monies received after the death of the testator by the defendant, to the use of the plaintiff as executrix, &c. Upon *non assumpsit* pleaded, the plaintiff was nonsuit. And now she brought a new action. And the defendant moved to have costs, before the plaintiff should be permitted to proceed. And 1 Vent. 109. *Cro. Car.* 219. *Atkey v. Heard*, were cited; where an administratrix nonsuit in *trover* brought by her upon a conversion in her own time paid costs. And here she might have sued, without naming herself executrix. But denied *per curiam*. For in *trover* she might have sued, without naming her self executrix, if the going on to trial be shall, D. acc. Burr. 1586. An executor cannot sue in his own right for money of the testator received by the defendant after the death of the testator. (a) R. cent. Salk. 207. 6 Mod. 91. 181. post. 1215. ante 436.

(a) According to 6 Mod. 93. Salk. 207. the action was an *indebitatus assumpsit* on an account stated with the plaintiff, not an action for money had and received. (b) D. acc. 1 Vent. 92. post. 1216. Semb. acc. 1 Vent. 109. Str. 1107.

An executor when plaintiff, who cannot sue except as executor shall not pay costs upon a nonsuit R. acc. ante 436. Acc. 6. Mod. 93. Salk. 207, 208. Burr. 1586. Sem. acc. Str. 1106. 6 Mod. 91. 181. Vide Burr. 1927. ante 436. and the cases there cited, cost for not

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goods were once in her possession; but otherwise in this case, for these debts are not *assess* till recovered. Note, Mr. Raymond cited for the plaintiff *Cro. Jac.* 361. *Barret v. Winchcomb*, *Yelv.* 168. *Cro. Jac.* 229. *Hayworth v. David*. 1 *Ventr.* 92. 2 *Lev.* 165. *T. Jones* 47. *Bull v. Palmer*. *Cro. Car.* 29. *Beacock's case*. 3 *Lev.* 60. *Mason v. Jackson*. See *Hil.* 10 *Will.* 3. *C. B. Nicholas v. Killigrew*. *Ante*, 436. But note, that in another action between these parties the plaintiff paid costs for not going on to trial according to notice.

Intr. Trin. 1
Ann. B. R.
Rot. 527.

Yorke *vers.* Grenaugh.

An inn-keeper may detain for his keep against the right owner a horse left with him to be kept tho' the persons who left him had no right with him. R. acc. 3 *Bulstr.* 269. 285. Vide 1 *Bulst.* 170. 1 *Roll.* 449. *Yelv.* 67. Com. Action on the case for negligence. R. 3. 2d Ed. vol. 1. p. 211. And tho' such persons did not stay in the inn, And tho' the inn-keeper received the horse at such person's request, And omitted demanding any thing for the keep upon application by the owner for his horse, Leaving his horse at an inn makes a man a guest there, S. C. *Salk.* 388. D. acc. *Cro. Jac.* 189. vide *Cro. Jac.* 188. *Noy* 126. 1 *Roll.* 449. 3. E. pl. 3. 1 *Vin.* 225. E. pl. 3. An allegation that a man was possessed of an inn as of his own proper inn, implies that he kept it. The court cannot make a rule to prevent the entry of a judgment upon a suggestion that the party in whose favour it is to be entered died before the term in which it is given, if he has appeared of that term by his attorney.

Replevin of a gelding taken by the defendant the first of April 13 *Wil.* 3. *apud parochiam sancti Jacobi infra libertatem de Westminster in quodam hospitio ibidem vocato The Maidenhead and Castle*. The defendant avows, for that the said inn, &c. *modo existit necnon prædicto tempore*, &c. et abinde hucusque fuit commune hospitium pro hospitalione quarumcunque personarum et earum equorum, &c. hospitalionem pro seipsis, equis, &c. suis in hospitio illo requirunt; and the defendant further saith, that he for one whole year ante prædictum tempus quo, &c. necnon eodem tempore quo &c. fuit et adhuc existit communis hospitator, viz. *apud parochiam prædictam ac de communi hospitio prædicto in quo*, &c. possessionatus ut de hospitio ipsius the defendant proprio, and entertained there for all the said time divers guests, &c. and that he being a common inn-keeper ut præfertur before the said time in which, &c. viz. the twenty fifth of March 13 *Wil.* 3. aforesaid quidam viator eidem defendenti ignotus accessit to the said inn of the defendant ducens secum spadonem prædictum in hospitium illud, quem quidem spadonem idem viator prædicto the defendant adtunc et ibidem deliberavit per the said defendant in eodem hospitio fore pabulandum, ac prædictus the defendant adtunc et ibidem ad requisitionem prædicti viatoris spadonem prædictum in the said common inn of the defendant in quo &c. ad custodiendum et cum necessariis providendum recepit; and the said defendant stable, corn, hay, &c. for the said gelding juxta requisitionem prædictum from the said twenty-fifth of March until the time in which, &c. necnon usque vicimum diem Maii extunc proxime sequentem, invenit ibidem, &c. quosque 2 l. 6 s. 8 d. adtunc et ibidem, viz. the twentieth of May, was a reasonable price for the stabling, corn, hay, &c. of the gelding aforesaid, and to the defendant was justly due, &c. and that he was not paid, neither by the traveller, nor by the plaintiff nor by any other; and therefore he justifies the taking and detain-

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ing, &c. The plaintiff pleads in bar of this avowry, that he the said first of April demanded this gelding of the defendant, and that the defendant *ad tunc nec ad aliquod tempus postea* demanded of the plaintiff any sum for maintaining this gelding, &c. Upon which the defendant demurred, and the plaintiff joined in demurrer. And it was held by all, that the plea in bar was ill; for the inn-keeper may detain for the meat, &c. of the horse, without making a demand. Besides, that perhaps the defendant demanded the money due for the meat before the first of April; for the plea is, that he did not demand upon the first of April; but the horse was there the twenty-fifth of March, and the money due for it before the first of April, might be demanded before the first of April, which is a good justification of the distress. But divers exceptions were taken by Darnall queen's serjeant to the avowry. 1. That since the horse was brought to the inn by a stranger, the inn-keeper cannot detain it for its meat against the right owner. For it may be, that this traveller was a wrong doer or a robber. *Sed non allocatur.* For *per curiam*, supposing that this traveller was a robber, and had stolen this horse; yet if he comes to an inn, and is a guest there, and delivers the horse to the inn-keeper, (who does not know it) the inn-keeper is obliged to accept the horse; and then it is very reasonable, that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider, who is owner of the horse, but whether he who brings him is his guest or not. And Holt chief justice cited the case of the Exeter carrier; where A. stole goods, and delivered them to the Exeter carrier, to be carried to Exeter, the right owner finding the goods in possession of the carrier, demanded them of him, upon which the carrier refused to deliver, without being paid for the carriage. The owner brought *trouer*, and it was held, that he might justify detaining against the right owner for the carriage; for when A. brought them to him, he was obliged to receive them and carry them; and therefore since the law compelled him to carry them, it will give him remedy for the premium due for the carriage. The same reason holds in this case. [But Powell justice said, that a carrier could not detain for his carriage; but note the (a) contrary has always been held by Holt chief justice at Guildhall.] 2. A second exception was, that the avowant ought to have said, *quod tenuit* the inn; now he has said, that he was possessed of it, which may be true, and yet perhaps he did not keep it. That it is necessary to say, *quod tenuit*, 11 Hen. 4. 45. Dier 266. Rast. Entr. 404, 5. Co. Entr. 377. *Sed non allocatur.* For it appears sufficiently, that he kept it; for it is said, *ut de hospitio suo proprio*. 3. There is an appearance that the horse stood at livery; for it is said, that he was received at the request of the traveller, which implies a special contract; and then the defendant

A carrier may detain goods for the carriage against the right owner, tho' they were delivered to him by a person who had no right to them.

(a) Vide ante 752.

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An inn-keeper cannot detain a horse for his keep, unless he was bound to receive the person who brought him as a guest.

endant cannot detain. *Sed non allocatur.* For it implies no more than what happens, when any one comes into an inn, he commands some servant to take his horse. 4. The fourth and grand exception was, that it is not sufficiently shewn in the avowry, that this traveller was a guest. For if he was not such a guest, as the inn-keeper was obliged to receive, though he received him, he cannot retain the horse for the meat. Now the word *viator* does not sufficiently describe a traveller, but it ought to be *ibidem transiens*. For *viator* imports only a traveller who has been beyond sea, or an *apparitor*. To which Mr. Eyre for the defendant urged, that it signified a traveller. It was further urged for the plaintiff, that perhaps this *viator* in passing by left the horse, and did not enter into the inn himself, and that will not make him a guest. But Mr. serjeant Darnall *contra* said, that such a one would be a guest; and that if in such case the inn-keeper received the horse, and he is lost, he will be chargeable, and he may detain in such case for the meat of the horse. And for authorities, he relied upon the cases *Cro. Jac.* 188. *Noy* 46. *Moor* 877. *Latch.* 126. *Popb.* 178. But as to this exception *Holt* chief justice held it good, and that for this fault the avowry was ill. For it may be in this case, the traveller stole the horse, and brought him to the inn, and the defendant received him and gave him meat, but the traveller never lodged in the inn. Now that is rather the business of a man that keeps livery stables than of an inn-keeper. And though in such case if the horse be lost, the livery man shall be answerable; yet he cannot retain for the meat, but has a remedy upon the contract; for he is not compellable to receive such a horse. And as to the difference taken in the case of *Robinson v. Waller*, and the point resolved there, he did not regard it, because it was pleaded specially in *trover*, whereas nothing can be pleaded specially in *trover* but a release. And (by him) it is the lodging of the man at the inn that makes him a guest; and nothing of that appears in this avowry, and therefore he held it ill. But all the other judges *contra*, that the avowry was good, relying upon the cases of *Robinson v. Waller*, and *Sturt v. Dumgold* cited before, which were adjudged upon the matter in law after several debates; no notice being taken of the fault in the plea, *viz.* that it amounted to the general issue. And (by them) if a man set his horse at an inn, though he lodge in another place, that makes him a guest, and the inn-keeper is obliged to receive him; for the inn-keeper gains by the horse, and therefore that makes the owner a guest, though he was absent. *Contra* of goods left there by a man, because the inn-keeper has no advantage by them. And they held, that since the matter shewn makes it appear that he was a guest; it is enough, though it is not expressly averred, that he was a guest. But *Holt* chief justice *contra*, that
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this matter is but evidence of it, that he was a guest, and is not traversable; but guest or not is the more material part of the avowry, and traversable; and therefore there ought to have been a positive averment, that he was a guest. *Powell* justice said, that there was no special demurrer in the case of *Robinson v. Waller*, and therefore no advantage could be taken of it, that the plea amounted to the general issue, since it was but form. But *Holt* chief justice held it to be ill upon a general demurrer, because the plea does not answer the conversion, which is the point of the action. But judgment was given by *Powell* and *Gould* justices, *absente Powys* justice (though he was when it was argued before of the same opinion) for the avowant, *dissentiente Holt* chief justice.

The next day a motion was made, that no judgment should be entered, upon suggestion that the plaintiff had been dead three terms. The court agreed, that they might make such a rule; but because the plaintiff had appeared of this term by his attorney, they refused to make a rule in it, but left the executors to bring error. It would have been otherwise, if the plaintiff had not appeared by his attorney.

Ogle *vers.* Norcliffe.Intr. Pasch. 1
Ann. B. R.
Rot. 380.

AN action upon a bill of exchange. The defendant pleaded in abatement, that he was clerk to one of the prothonotaries of the common pleas, and ought not to be sued (except for treason or felony) in any other court than in the common pleas (and lays a custom in the negative) without his consent. The plaintiff replies, that the defendant consented to be sued in the king's bench. The defendant demurs. And the bill was abated, because the consent intended in the plea is a waiver of the privilege by some act in a court of record. And as to the exception taken, that (b) the custom was laid in the negative, *Holt* chief justice said, that it was a privilege due to the clerks of the common pleas of common right, of (c) which the king's bench will take notice. Otherwise perhaps it might be of the clerks of the exchequer.

The privilege of C. B. cannot be waived otherwise than by an act in a court of record. (a)

B. R. will take notice ex officio of the privilege of the prothonotary's clerks in C. B.

(a) According to reports on this case in Salk. 4. and 7 Mod. 97. The ground of the judgment was that the plaintiff did not allege any venue for the consent. (b) Vide post 898.
(c) Vide post 898.

Intr. Hil. 13
W. 3 B. R.
Rot. 593.

Rous *vers.* Etherington.

S. C. Salk. 312. Holt 313.

If a *capias* ad respondendum is sued against several as executors, and the sheriff returns *non est inventus* to all but one, and as to him *cepi*, the plaintiff may proceed against him alone, and if he is intitled to a judgment, he may enter it against them all. Semb. acc. 1 Keb. 743. vide 1 Keb. 743. And if he does they must all join in a writ of error upon the judgment. vide ante 71, and the cases there cited.

(a) Sed vide post 891.

AN action was brought against two defendants as executors, and a *capias* issued against both. As to one of them, it was returned *non est inventus*. The other appeared, and judgment was given against him by *nil dicit*, but it was entered against both. He who appeared brought a writ of error, and concluded it *ad damnum ipsius*. Upon which, after several exceptions had been over-ruled as to being errors, Mr. Broderick moved, that the writ of error was ill, because both the executors ought to have joined in it. And *per Holt* chief justice, by the statute of 9 Ed. 3. c. 3. if debt be sued against several executors, and one appears, and the other makes default upon the great distress, the court may proceed against him that appeared, and if the plaintiff has judgment, it shall be against all the executors for the goods of the testator. And the 25 Ed. 3. c. 17. which gives a *capias* in debt, has been always construed, to be within the equity of the 9 Ed. 3. so that if there are several executors defendants, and a *cepi* is returned as to one, and *non sunt inventi* to the others; the plaintiff may proceed against him that appears, and if he recover, he shall have judgment against all; for the default upon the *capias* is the same as upon the great distress; so judgment being against all, all ought to join in the writ of error; for the judgment is *ad grave damnum* of all; and the costs, which are adjudged only against him that appeared, are but accessory to the principal judgment, which (a) cannot be reversed *quoad* them only. The writ of error was abated.

Rogers *vers.* Reresby.

S. C. 3 Salk. 8.

In ejectment by original the demise may be laid on the *est*-in-day of the term of which the declaration is intitled, tho' the declaration is intitled of the term generally. vide 1 T. R. 116.

At least no objection can be made on this account after verdict.

IN ejectment by original the declaration was general of Michaelmas term; the demise was laid to be the twentieth of October. After verdict for the plaintiff, Mr. Southouse moved in arrest of judgment, that the action was brought before any cause of action accrued, the twentieth of October being the *essoin* day of the term, and the first day of it in law. To which it was answered, that the ejectment and the action may be upon the same day. But yet (*per curiam*) this action being, by original, it is very consistent, because the ejectment was in full term; yet it being a long term, a man may sue an original *teste* in full term, and returnable before the end of it. Then since it is possible that it may be well, the court will intend

intend it after verdict. Farther, if it be a slip, advantage should have been taken of it upon (a) *oyer* of the original. And judgment was given for the plaintiff.

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v.
RERESHY.

(a) Vide *Ford v. Burnham*, Barnes 4to Ed. 340. Dougl. 215 459. 1 T. R. 149. see also post 902, and the cases there cited.

Jacky *vers.* Butler.

TWO joint partners are in trade. Judgment was entered against one of them. And upon a *fiery facias* all the goods, being undivided, were seized in execution. And upon application to the king's bench by him against whom the judgment was not, the court held, that the sheriff could not sell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution.

Under an execution against one of several partners, the share only of him against whom the execution issued can be sold.
R. acc. 1 Show. 173. Dougl. 627.

Semb. acc. Salk. 392. Comb. 217. 3 P. Wms. 25. Cowp. 449. vide 12 Mod. 446.

Regina *vers.* Savill.

S. C. Salk. 605.

AN order made at the general quarter-sessions at *Hertford*, that the defendant should be prosecuted as a common barretor, and that the prosecution should be at the charge of the county, being moved into the king's bench by *certiorari*, was quashed, because the justices have not power to charge the county with the costs of such a prosecution. And as to the objection made by Mr. Comyns in the maintenance of the order, that by 43 *El. c. 2. s. 15*, the justices may dispose of the surpluse of the money levied for the poor for charitable purposes, and that this was such; it was answered, that this was an original order to charge the county, and not an order of payment out of the surpluse of stock raised.

The sessions cannot make an order for prosecuting a man as a barretor at the charge of the county.

Lucas *vers.* Haynes.

S. C. Salk. 130.

TROVER for a bill of exchange. Upon not guilty pleaded, at the trial at *Guildhall* before *Holt* chief justice, upon evidence the case appeared to be thus. J. S. drew a bill of exchange upon the defendant, payable to the plaintiff or order. The plaintiff indorsed his name upon it, and delivered it to J. N. who carried the bill to the defendant, and left it with him for acceptance. Afterwards the bill of exchange being lost, the plaintiff brought *trover* for it, and produced J. N. as a witness, to prove the delivery of the bill to the defendant. And it was objected, that he ought not to be admitted as a witness, because by the indorsement the property of the bill was vested in him. But it was held by the king's bench, it being moved there, that the bare indorse-

A blank indorsement upon a bill does not necessarily divest the property out of the indorser. R. acc. Salk. 126. 12 Mod. 192.

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ment of a man's name upon a bill of exchange, without writing some words purporting an assignment, does not alter the property of the bill; for it may be filled up with a receipt of the money, or an assignment, at the election of the party that has the bill; and consequently that *J. N.* was a good witness. Note, that the plaintiff had paid the money to *J. N.*

Intr. Mich. 10
W. 3. B. R.
Rot. 414.

Clements *vers.* Langharne.

S. C. Salk. 168.

If baron and feme intend to levy a fine of the feme's land, and she dies before the return of the writ of covenant, the fine cannot be completed, if it be erroneous. Acc. Cruise 48, 49, &c. See Barnes 144. Supple. to Barnes fol. 32.

THE plaintiff brought a writ of error, to reverse a fine levied in the grand sessions in *Wales* in the county of *Pembroke*, as heir to the wife of the consor, the land being the land of the wife. And the error assigned was, that she died before the return of the writ of covenant. Upon a *scire facias* against the terretenants, &c. the defendant was returned terretenant (who was also consuee) and warned. And upon mentioning the error by Mr. *Raymond* to the court, the fine was reversed without difficulty.

Curlewis *vers.* Dudley.

*Tis not necessary in actions in B. R. to enter any continuance between the declaration and plea. S. C. Salk. 179.

An action may be brought in B. R. for any offence committed in the county in which that court sits notwithstanding the 21 J. 1. c. 4.

R. acc. ante 370. W. Jon. 193. Salk. 373. D. acc. 2 Keb. 424. q. v. acc. 1 Bac. 40.

IN debt upon 5 *El. c. 4.* for exercising a trade, without having served five years as apprentice, upon demurrer to the declaration Mr. *Broderick* for the defendant took exception, 1. That the action was discontinued, because the declaration was of *Michaelmas* term, and the plea roll of *Easter* term, and there is no continuance from *Michaelmas* term to *Hilary* term, and from thence to *Easter* term. *Sed non allocatur*: Because by the course of the king's bench they never enter continuances until the plea comes in, though the declaration was delivered four terms before. 2. A second exception was, that debt does not lie in such case in the king's bench by 21 *Jac. 1. c. 4.* *Sed non allocatur*. For the difference is, where the action is brought in *Middlesex*, and where in a foreign county. In the latter case debt does not lie in the king's bench, but the remedy is before the justices of *oyer and terminer* by 21 *Jac. 1. c. 4.* But otherwise it is, where the action is brought in the county where the king's bench is; because the king's bench is a court of *oyer and terminer*. And the resolution in the case of *The King v. Galt* was cited, which see before, 370, *Hil. 10 W. 3. B. R.* Judgment was given in this case for the plaintiff.

Price *vers.* comitem Torrington.

S. C. Salk. 285. Holt 300.

IN *indebitatus assumpsit* for beer sold and delivered to the defendant, upon *non assumpsit* pleaded, at the trial at Guildhall before Holt chief justice, the evidence against the defendant was, that the usual way of the plaintiff's trading was; that the drayman came every night to the plaintiff's clerk, and gave account to him of all the beer that he had delivered that day; and an entry was made of it in a book, which the drayman and clerk subscribed; and that there was such an entry of ——— barrels of beer delivered to the defendant, &c. and that the drayman was dead, and the subscription was proved to be of his writing. And Holt chief justice held this good evidence to charge the defendant. And a verdict was given against him, &c.

If a tradesman uniformly obliges his servants to subscribe in his books an account of the goods they deliver, proof of the subscription of a servant who is dead is evidence of the delivery of the goods contained in the account subscribed. R. acc. ante 732.

Broughton *vers.* Langley.

S. C. Lutw. 323. Salk. 679. Holt 708. 1 Eq. Ab. Trust and Trustees. C. pl. 3. 4th Ed. p. 383. Pleasings and Verdict, Lutw. 814. post vol. 3. p. 152.

THE plaintiff *Humphry Broughton* brought an ejectment against the defendant *Abraham Langley* upon a demise of three messuages, twenty acres of land, &c. lying at *Hipperholme cum Briggthouse* in the parish of *Halifax* in the county of *York*, made to the plaintiff for five years, to be computed from the first of *March 12 W. 3.* &c. by *John Ramsden junior*. Upon not guilty pleaded, and a trial had before *Turton* justice at the *Summer assises* held at *York 12 W. 3.* a special verdict was found, viz. that before the time of the trespass and ejectment *Robert Ramsden* grandfather of the said *John Ramsden* lessor of the plaintiff was seised of the, &c. in fee; and being so seised, the sixth of *April 1689* he made his testament, and thereby devised the messuages, &c. in question with their appurtenances, in his *verbis*, viz. I do hereby give, devise; and bequeath unto *John Stancliffe*, and *Robert Ramsden* my second son, and their heirs and assigns, all those my messuages or tenements with the appurtenances at *Norwood-green*, and all the houses, buildings, closes, lands and grounds to the same belonging, now in the tenure of *Jeremy Robinson* and *Robert Wilson*, or their assigns; and I do hereby express, publish and declare, that the said *John Stancliffe* and *Robert Ramsden* my son and their heirs shall by force of this my last will and testament stand and be seised of the said messuages, &c. to all the uses, intents and purposes herein after mentioned; that is to say, First of intent and purpose, that they shall permit and suffer *George Ramsden* my son to have, receive and

Intr. Trin. 12 W. 3. B. R. Rot. 414.

Under a limitation to two and their heirs in trust to permit J. S. to take the rents, issues and profits of the estate, the use is executed in J. S. D. acc. 1 Bro. C. C. 75. A power to make a jointure may properly be given to a tenant in tail. Acc. 1 Vent. 214, 225. vide post 1440.

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and take the rents, issues and profits of the said messuages, &c. for and during the term of his natural life, and after his decease shall stand seised thereof to the use of the heirs of the body of the said *George* my son lawfully begotten and to be begotten, and for default of such issue to the use of the said *John Ramsden* and *Robert Ramsden* my sons, and of their heirs and assigns for ever, equally to be divided amongst them; Provided always and upon condition that if it shall fortune the said *George* my son to marry a woman that shall have *bona fide* one or more hundred pounds, that then the said *John Stancliffe* and *Robert Ramsden* my son and the said *George* shall have power by virtue of this my will to make a jointure to and for such wife of 10*l.* per annum out of the same lands, &c. for every hundred pounds such wife shall have for her portion for the life of such wife, and after to the heirs of the body of the said *George* upon such wife, &c. then the jury find further, that the said *Robert Ramsden* the grandfather by his said testament devised other tenements at *Norwood-green* in *Hipperholme* aforesaid to his said son *Robert Ramsden* in fee, in the occupation of *Richard Riddlestone*, upon condition that the said *Robert Ramsden* should permit and suffer *George Ramsden* and his heirs peaceably to enjoy and occupy a close of land called *Paradise*, and to take the rents, issues and profits thereof to his own use; and in default thereof, that the said *George* and his heirs after any disturbance made by the said *Robert Ramsden* or his heirs in the enjoyment thereof should enter into one messuage, &c. part of the tenements lately mentioned and take the rents, &c. thereof until the said *Robert Ramsden* should desist from such molestation, and give security not to disturb for the time to come: then the jury find, that the deviser had issue three sons, *John*, *Robert*, and *George*; that the deviser died in 1689. that *George* upon the death of his father entered into the tenements in question aforesaid, and took the rents and profits to his own use during his life; that *George* in 1690 suffered a common recovery to the use of himself and his heirs; that by indentures of lease and release dated the first and second of *November 9 Will. 3.* *George* conveyed the premises, in consideration of 150*l.* paid by the defendant, to the defendant in fee; that he entred, &c. and was seised prout *lex postulat*; that *George Ramsden* died the first of *December 1697.* then they find *John Ramsden* junior, the lessor of the plaintiff, heir of the body of the said *George Ramsden*; and they find lease, entry and euster, and make the common conclusion, &c. The general question made upon this special verdict was, whether *George Ramsden* took an estate executed for his life by this will, or whether the estate remained in the trustees for his life, and he had only a trust not executed by the statute 27 H. 8. c. 10. of uses. For it was admitted, that if *George Ramsden* took an estate for his life executed, he would by virtue

of

of the subsequent clause (which limits the use to the heirs of his body) be tenant in tail executed; and then the common recovery suffered by him would bar the intail; and consequently the plaintiff would have no title, and the defendant's title would be good. But if he was but *cestuy que trust* for his life, and the estate remained in the trustees for the said time, it (a) would be otherwise. It was also admitted by the plaintiff's counsel, that a devise (b) of lands may be by express words to the use of another than the devisee, and that such use will be executed by the statute of the 27 Hen. 8. [For that see 30 Hen. 6. Fitz. devise 22. that a devise by custom may be to a use, and then such use will be afterwards executed by the said statute. See also the words of 27 Hen. 8. cap. 10. Moor. 107. 1 Sid. 26. and 2 Ventr. 312. Burchett v. Durdant.] And this case was argued at the bar by Mr. Cheatham, and Mr. Broderick for the plaintiff, and by Mr. Raymond and Mr. Chesbire for the defendant. And the counsel argued for the plaintiff, that George Ramsden had but a trust in these lands, and that the estate in law remained in the trustees. For they said, that though a devise may be by express words to the use of another than the devisee, yet without express words it cannot be averred to the use of another than the devisee, because it implies consideration in itself. 4 Co. 4. Leake and Randall's case. Then here by the first clause of the will, I give and bequeath to John Stancliffe and Robert Ramsden and their heirs, the estate and use passed to them in fee, if there are not subsequent words expressed, to convey the use to George Ramsden. And (by them) the subsequent words will not carry the use to George Ramsden. For they are, that John Stancliffe and Robert Ramsden shall stand seised, to the intent that they shall permit and suffer George Ramsden to receive the rents, issues and profits for his life; which words pass no estate to George Ramsden, but apparently shew the intent of the deviser to be, that the trustees shall have the estate in law, but that George Ramsden by their permission shall receive the benefit of it. For if he had intended, that George Ramsden should have the estate in law, he would not have said, that the trustees should permit and suffer George Ramsden to take the profits, &c. which he might do in spite of them. Besides, his intent appears more plainly by the subsequent clause, for when he devises the estate to the heirs of the body, he varies the phrase, and leaves out the words permit and suffer, but says, that the trustees shall stand seised to the use, &c. so that there he devises the very estate. Farther his intent appears more plainly, by the clause which gives power to George Ramsden and the trustees, to make a jointure; for if he did not intend, that the trustees should have the estate, it would be vain and ridiculous, to appoint them to join in the conveyance. Then several cases were cited, that the words permit and suffer would

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(a) R. acc. ante
33. 2 Vin. 262.
pl. 19. 1 Bro.
C. C. 73. 75.

(b) D. acc. Gilb.
on uses 281.

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not pass an interest in the land, but founded only in covenant. 1 Roll. Abr. 848. Lit. X. pl. 2. Keilw. 41. 3 Bulstr. 252. Cro. Jac. 172. 2 Mod. 81. Cro. Eliz. 223. Cro. Jac. 598. But for authority in point they relied upon the case of *Burchett and Durdant*, 2 Ventr. 311. where *H. Wicks* devised lands to *John Higden* and his heirs, upon trust that he should permit and suffer *Robert Durdant*, during his life, to take the rents, issues and profits, *Robert* committing no waste, and after his death to the heirs of the body of *Robert Durdant* then living. And it was there held in the exchequer chamber, that the estate in law remained in *Higden*, and that *Robert Durdant* had but a trust; which is the same with the principal case. And therefore for these reasons they prayed judgment for the plaintiff.

E contra it was argued for the defendant, that this was an estate executed in *George Ramsden*, by the statute of the 27 Hen. 8. To prove which they said, that before the statute of 27 Hen. 8. an use, confidence or trust, were the same; but now since the statute, common parlance has made a distinction between a use and a trust; as if the first should be executed in possession by the said statute, the other not; though in truth a trust shall be executed, as well as an use. As if *A.* makes a feoffment to *B.* in trust for *C.* this shall be executed by the statute. But they urged, that before the statute such a limitation as that would have been an use; and therefore consequently being the first use, it shall now be executed by the statute. An use in 1 Co. 121. b. Co. Lit. 272. is defined to be a trust or confidence, which doth not issue out of the land, but is *quasi* a thing collateral, annexed in privy to the estate and to the person, touching the land, viz. that *cestuy que use* shall take the profits, and that the terretenant shall convey estates according to the direction of *cestuy que use*: so that *cestuy que use* had neither *jus in re* nor *ad rem*; but in equity he had both, where his remedy was by *subpoena*. *Cestuy que use* may be sworn upon an inquest. Lit. sect. 464. There may be *possessio fratris* of an use. 5 Edw. 3. 27. But *cestuy que use* could not distrain cattle *damage feasant* upon the land. Dier, 9. Plowd. 352, 349. Keilw. 41, 46. He could not release the rent to the tenant of the land, nor give licence to enter upon the land, 9 Hen. 7. 26. He could not take the trees, 15 H. 7. 13. And all actions ought to be brought in the name of the feoffees, 7 Ed. 4. 29. b. Now this definition of an use agrees with this devise to *George Ramsden*, considering it as before the 27 Hen. 8. cap. 10. For here there is a confidence reposed in the persons of *John Stanclyffe* and *Robert Ramsden*, and their heirs; it is annexed in privy to their estate, but collateral to the land; it is that *George Ramsden* shall take the profits, and of consequence that they shall convey estates according to his direction, and according to the interest that he had in the use.

D. St. & Stud.
14 Hen. 8.
14 Hen. 4.
b. Dier 96.
Ed. 4. 4. b.
Ed. 4. 5. b.
owl 352.
Dier 506. W.
cs 116, 127.

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use. It is the same thing as if the devisor had said, I devise the land to trustees to the use of *George Ramsden* or to the intent that *George Ramsden* should take all the land to his use; for a grant of the rents, issues and profits, is a grant of the land itself. *Co. Lit. 4. b. 14 Hen. 8. 6.* If it be so in a grant, much more shall it be so in a devise. *Moor 753. Griffith v. Smith. 3 Leon. 78. pl. 118. 2 Leon. 221. Hob. 285. Balder v. Blackburne. Hutt. 36. Moor 774. Yelvert. 73. Carpenter v. Collins. So Pasch. 8. Will. 3. B. R. between South and Allen, 3 Salk. 228. Comb. 375.* in ejectment upon a special verdict the case was, that *J. D.* seised of the lands in question in fee, 29 *Car. 2.* devised all the rents, issues and profits of them to *Sarah Burges*, wife of *John Burges*, for life, to be paid by his executors, so as the husband of *Sarah Burges* should not intermeddle with them; the question was, whether *Sarah Burges* by this devise had the lands themselves, or whether the executors were trustees for her? *Rokeby* and *Samuel Eyre* justices held, that the executors were trustees; but *Holt* chief justice held, that this was an express devise to the wife herself, and that the subsequent words could not restrain it. Wherefore the counsel for the defendant concluded, that a devise of the profits is the same as a devise of the land but that a devise of the land to trustees, to the intent that *George Ramsden* should have and take the land, would have been an use executed in *George Ramsden*; and therefore that this devise to the trustees, to the intent that *George Ramsden* should take the profits, will be an use executed in *George Ramsden*. They compared this case to the case *Pasch. 27 Hen. 8. 6. pl. 15.* where in a deed the covenantor declared, that his recoverees (having suffered a common recovery before) should suffer *Giles* to take the profits of the lands, it was held an use in *Giles*. So 30 *Hen. 6. Fitzb. devise 22.* a devise that one of the three feoffees should receive the profits, held a confidence, which is the same with an use. So in this case, before the statute of 27 *Hen. 8.* this would have been an use in *George Ramsden*, and *John Stancliffe* and *Robert Ramsden* would have been seised of these lands to the use or in trust for *George Ramsden*; and then it would be executed in possession, by the express words of the 27 *Hen. 8. cap. 10.* which are, that where any person shall be seised of any manors, lands, &c. to the use, confidence, or trust, of another in fee tail, or for life, such use shall be executed in possession. Then they gave answers to the objections made of the other side. 1. And first to the intent of the devisor, because he intended that this should be only a trust; they answered, that it is true, that it is said in several books, that the intent will govern the raising of uses. *Perk. 102. stat. 530, &c.* But that which is intended by the said books, is, that the judges will not adjudge an use or interest to pass, contrary to the intent of the party. But there is no authority in any book, that the intent of the party can hinder the operation of the law.

Under a devise of the rents issues and profits of an estate to a feme covert for life to be paid by the executors of the devisor, so as the husbands should not intermeddle with them, Q. whether the legal estate vests in the feme, or the executors.

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And in this case of the statute in the execution of the use that is raised, if a man covenants to stand seised, to the use of himself for life, without impeachment of waste, and after his decease to the use of the heirs male of his body; the man's intent is plain, to have but an estate for his life, yet the law supervenes his intention, and makes him tenant in tail. 1 Vent. 379. *Pybus v. Mytford*; where *Hale* chief justice says expressly, that the intent of the party cannot control the operation of the law. 2. As to the objection made from the power, they said that it would not be void; but that it was a prudent caution made by the deviser, that the son should not marry without the consent of friends. For there the trustees, though the estate was executed in *George Ramsden*, may execute the power, and join in making of the jointure; and when it shall be made, the jointure will be in by the will. As to the case of *Burchet v. Durdant*, cited on the other side out of 2 Vent. 311. they said, that the principal point in the said case was, whether the remainder, limited to the heirs of *Robert Durdant* now living, vested in *George Durdant*, or was contingent, viz. whether that was a descriptio of the person? and it was held, that it was, and that the remainder vested in *George Durdant*: and therefore the other question, whether the estate for life was executed in *Robert Durdant* or not, was intirely immaterial; for be it so or not, *Robert Durdant* was but tenant for life, and therefore his recovery would not bar *George Durdant* nor his heirs, &c. [See the said case, Sir T. Jones, 99. 1 Vent. 334. 3 Keb. 832. Raym. 333.] And for these reasons the counsel for the defendant concluded, that this was an use executed in *George Ramsden*, &c. and therefore that judgment ought to be given for the defendant. And of that opinion was the whole court. And they agreed in omnibus with the defendant's counsel, and their answers to the objections made by the plaintiff's counsel. They said, that a use and trust (as to the words themselves) were of the same purport as to the execution by the said statute. For if a man makes a feoffment in fee to A. in trust to permit B. to take the rents, issues and profits; this will be an use executed as well as if A. had made use of the word use. They approved also of the answer given to the objection, that the intent appeared by the power; and said, that this was a good precedent, to keep children dutiful to their relations, when they cannot settle jointures upon their marriage without their concurrence. And they said, that if they construed this limitation only a trust, there will be strange debates. For if *George* shall have children, then the trustees will be seised in fee in trust for *George* for life, and the issues will be tenants in tail; which will be strange. Therefore it will be better to construe it one intire use executed by the statute. And judgment was given for the defendant.

Regina *vers.* Taylor.

AN information was exhibited against the defendant by the attorney general, for that that he such a year and place *proditorie* spoke these words upon the thirtieth day of January; king Charles the first was rightly served in having his head cut off, and it was a pity his two sons Charles and James were not served so too at the same time. And the speaking of these words was laid to have been in contempt of the deceased king William the Third and his laws, *et ad malum exemplum omnium aliorum in hujusmodi casu delinquentium et contra pacem dicti nuper regis*. Upon not guilty pleaded, the defendant was found guilty before the chief baron at the assizes at Kingston in Surry. And now Mr. Weld and Mr. Mountague moved in arrest of judgment. 1 That the words being spoke of dead persons, were not punishable, unless they had some influence upon the living; and therefore it ought to have been averred, that they were spoken *ea intentione* to alienate the affections of the people from the present government. *Sed non allocatur*. For, *per curiam*, if the words advance pernicious doctrine, and evil tenets, they have an influence upon the present government. Now these words justify regicides, and the murder of king Charles I. which is declared 12 Car. 2. c. 30. to be murder by act of parliament; and the regicides are attainted; and a fast day is appointed to be observed, to pray God to avert his judgments, &c. And if such doctrine be countenanced, it will endanger the queen's person. 2. A second exception was, that the word *proditorie* is used in all charges of treason, and therefore the inserting of it makes the fact here charged treason; whereas the bare (b) speaking of words cannot be treason; and therefore the information was ill. And Mr. Mountague said farther, that for this reason no information would lie at all, but the defendant ought to have been indicted for treason. *Sed non allocatur*. For, *per curiam*, the word *proditorie* will not render the information worse. If it appear upon an indictment, that the fact charged is high treason, there is a necessity of having the word *proditorie* in the indictment as well as *felonice* in case of felony. But if the indictment be for a misdemeanour that hath a tendency to high treason, it is not necessary, to have the word *proditorie* in it; but the inserting of it is not improper, because it shews that the defendant had a treasonable intent, though he was afraid to put it in execution. But farther if the word *proditorie* was insensible here, it would not vitiate, but should be rejected as surplusage. 3. A third exception was, that the *contra pacem dicti nuper regis*, when there were three kings men-

'Tis criminal to speak in justification of regicides within this kingdom.

Tho' the party had no intention to alienate the people from the government. Stating an act to have been done treasonably, does not necessarily imply that it was treason. Vide 3. W. & M. c. 13. (a)

If an act is stated to have been done in contempt of the deceased king, W. 3. and his laws and against the peace of the said late king, the words the said late king, will apply to W. 3. tho' the other dead kings were mentioned before.

(a) The preamble of this act states one object of it to be to prevent "all traitorous correspondence and commerce with France. (b) R. acc. Cro. Car. 117.

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tioned before, was uncertain to which of them it referred, and therefore it was ill. *Sed non allocatur*. For, *per curiam*, the *contra pacem*, &c. are words of reference, and cannot relate but to king *William*, who was named in the same sentence a little before. And judgment was given for the queen, that the defendant should stand twice in the pillory, and he was fined forty marks. Note, that the defendant was a tanner, and appeared to be in indifferent circumstances.

Intr. Mich. 12
or 13 Will. 3.
B. R. Rot.
132.

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A *clausum fregit* sued out for the purpose of bringing the defendant into court in order to enable the plaintiff to declare against him in an action of *assumpsit*, will not prevent the statute of limitations from attaching upon the cause for which such action is brought, R. acc. ante 553. R. cont. ante 432. & vide Bl. 924. 3 Will. 460. Imp. C. B. 2d Ed. 478. See also 3. Bac. 516 particularly if the action is brought by an executor. And if it would it could not be pleaded to the action unless it was returned. Vide ante 432. And the replication would be bad if it did not shew that it was returned. vide ante 432.

ERROR upon a judgment of the common pleas in *indebitatus assumpsit* for 14 l. brought by an executor, and the action was laid in *Leicestershire*. The defendant pleaded *non assumpsit infra sex annos*. The plaintiff replied, and shewed a *clausum fregit* in *Derbyshire* sued within the six years; and that it was with intent to arrest the defendant, and when he was brought in, to declare against him in *assumpsit*, according to the course of the common pleas. The defendant rejoined, that he did not assume within six years before the issuing of the *clausum fregit*. And upon issue thereupon a verdict was given for the plaintiff. And judgment accordingly in *C. B.* And now upon the general errors assigned Mr. *Parker* for the defendant in error argued, that supposing that the *clausum fregit* was sued with intent to declare in another action, and was well continued until the time of the declaration in the said action, that will be a sufficient prosecution within the statute of 21 Jac. 1. c. 16. And that though in this case the *clausum fregit* was not continued, yet that will be aided by the verdict; which will distinguish this case from that of *Mois v. Brereton*, ante 553. and of *Kensley v. Hayward*, ante 432. which cases were adjudged upon the point of the discontinuance. That such a writ sued will avoid the operation of the statute of limitations; because the words of the statute are general, shall be commenced and sued. If it had said, that an original shall be sued, the objection here would have been strong; but now the sole question is, what shall be said the commencement and suit of an action. Whatsoever is a proper method to bring the defendant into court to answer, will be the commencement and suit of an action; because an action in *Co. Lit.* 185. is defined to be nothing but *jus prosequendi in judicio quod sibi debetur*. That a *clausum fregit* is proper for that purpose, appears, 1. Because if a man lives in one county, and

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and commits a trespass in another ; if he be sued by original in trespass, there ought to be an original, and a *capias* upon it, in the proper county, and then a *testatum capias* in the county where he lives ; all which dilatory proceeding is saved by the suing of a *clausum fregit* at once, and by declaring against him in the proper county when he comes in.

2. If a man make a contract in the vacation, intending to run away immediately : if he be sued by original, he must be let go at large, because one cannot have an original but of the precedent term, which will be before the cause of action. But now by the help of this *clausum fregit* one may arrest him presently, and declare against him in a proper action the next term. The statute of 13 Car. 2. st. 2. c. 2. in the preamble takes notice of these *clausum fregits*, that they were processes used in the commencement of actions. And the said course is confirmed in *T. Jones* 217. *Aikins v. Jay*. Besides, that there are other commencements of suits in the common pleas than by original, as by bills of privilege. The true commencement of every action in point of law is a proper original in such action ; and therefore strictly speaking a *clausum fregit* cannot be an original, but in an action of trespass : but yet if by the course of the common pleas a *clausum fregit* issues, before the suing of a proper original in any action, and is used as a process to bring the defendant in, and upon such *clausum fregit* he is arrested, &c. the suing of such *clausum fregit* will be a suing and commencement of an action within the meaning of the statute of limitations ; for it is equally a demand of my right. And what shall be, and what shall not be, a commencement of an action, must be determined by the course of the court. And that is the reason, why a bill in the king's bench is held as the original there, and the want of it aided by verdict by 18 El. c. 14. within the words want of any writ, original, &c. *Hob.* 204. This statute has been expounded liberally, as to the saving the right of parties. Therefore it (a) has been resolved, that where an action has been commenced by plaint entred in an inferior court within these six years, and then the action has been removed by *habeas corpus*, and the statute pleaded ; though the proceedings here were *de novo*, yet the entry of the plaint in the inferior court was such a proceeding, as would avoid the statute of limitations, and that the proceedings upon the *habeas corpus* were in some sort a continuance of the former suit. 1 Sid. 228. *Whitwith v. Hovenden*, and the case in 3 Lev. 245. is exactly a case in point. Then he said, that the case of *latitats* in this court were of the same nature ; for they are issued for a supposed trespass, and when the defendant comes in, he shall answer in other actions. But the case of the *latitat* is a stronger case ; for a (b) *latitat* may bear *teste* before the cause of ac-

(a) Vide ante
553. post 1. 2.
1 Sid. 228. pl.
24. Salk. 424.
pl. 13. 1 Keb.
794. pl. 55.
799. pl. 66.

(b) Vide Cowp.
tion, 454.

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tion, 1 Vent. 28. and the bill of *Middlesex* in this court is never filed, and the *latitat* is the first process. *Dier* 118. *Cro. Car.* 264. So the *clausum fregit* is the first process in the common pleas, and always filed.

Objection. That there is no foundation for this averment, since there is no clause of *ac etiam billæ* in it, as there is in *latitats*.

Answer. The same objection held in all cases of *latitats* before the 13 Car. 2. st. 2. c. 2. in compliance with which statute the said clause was inserted in *latitats*, as appears in 1 Keb. 598. and so it is at this day in all *latitats*, where special bail is not required.

As to the matter of the discontinuance he said, that it was aided by the verdict by the 32 H. 8. c. 30. And he cited several cases of defects aided by verdict, as *Yelv.* 129. *Kendrick v. Pargiter.* 1 Saund. 226. *Stennel v. Hogden.* 1 Lev. 196. *Cro. Car.* 240. the case of *Gidley v. Williams.* See before, 634. *Allen* 32. *Cro. Jac.* 434. 2 Keb. 188, 230. the case in point upon a plea of a *latitat*.

E contra it was argued by Mr. Chesbire for the plaintiff in error, that both the cases cited by Mr. Parker, of *Mois v. Brereton* and *Kensley v. Hayward*, were adjudged upon this reason, viz. the originals were not proper in the said actions; and that this was worse than any of them, because this action was brought by executors, and the *clausum fregit* was for a trespass done to them in their own right, *quare clausum ipsorum fregit*; that the verdict would not help, because the original was improper, and therefore the issue void and immaterial: but in the cases cited of the other side the issues were proper.

Holt chief justice said, that this case was not like the case of *latitats* in the king's bench: because a *latitat* is an ancient process of this court, and was a process of this court at the time of the making of the statute of limitations; and the use only to bring in a man in custody, and then they declare against him in *custodia marescalli marescalciae*. But when a man is brought in by a *clausum fregit* in the common pleas, they do not declare against him in *custodia guardiani de la Fleet*, but upon an original proper for the action. And this practice of *clausum fregit* in the common pleas is new, and they have another way to sue there, viz. by original. But in the king's bench a *latitat* in some actions is the only way to commence the suit. North chief justice of the common pleas made a complaint of *latitats* in parliament,

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liament, and the matter suffered great agitation in parliament; but at last the *latitats* were approved, as they are also by 27 *El. c. 8.* which gives a writ of error in the exchequer chamber, but excepts errors to be assigned for want of jurisdiction in the king's bench. Now this being the process of the king's bench at the time of the making of the statute of limitations, it must be understood to be comprised within the meaning of the act. And he said, he imagined, that after the reversal of the judgment of *Kensley v. Hayward* was affirmed in parliament, this point would never have been moved again. But farther he said, here was a fatal fault, *viz.* that the plaintiff does not shew, that the original was ever returned. Now if he shews a writ, and does not return it, that will not avoid the statute of limitations. And *Powys* and *Gould* justices agreed in all these matters with the chief justice *Holt*; and said, that in the case of *Culliford v. Blandford* in the exchequer chamber all the judges there held, that a *latitat* was a kind of original in the king's bench. *Powell* justice agreed with them, that the judgment ought to be reversed, for want of shewing a return of the writ. But as to the other point he seemed to retain the opinion that he had given in the common pleas in the case of *Kensley v. Hayward*, when he was judge there, *viz.* that the shewing of such *clausum fregit* will avoid the statute of limitations, as well as a *latitat*; alleging that a *clausum fregit* was the ancient process of the common pleas, and very useful to the subject, in saving the fines due upon the original; which they never sue, if there is a verdict in the cause; but after a demurrer they sue it. The judgment was reversed.

Burdett *vers.* Wheatly.

ERROR upon a judgment given in the common pleas in case upon several promises, in which, upon *non assumpsit* pleaded, as to two of the counts verdict and judgment were given for the plaintiff, and as to the rest for the defendant. And the error assigned was, that the defendant was an infant at the time of the promises made, and also appeared by attorney. To which assignment the defendant in error demurred specially, because it contained matter of fact and of law also. And therefore the judgment was affirmed.

The plaintiff in error cannot assign error in fact and in law at the same time. *Acc. 1 Roll. Abr. 761. 9 Vin. 540. Com. Pleader 3. B. 15. 2d. Ed. vol. 5. p. 300.*

Andrews *vers.* Linton.

S. C. Salk. 265. Holt 273.

Intr. Hil. 1
Ann. B. R.
Rot. 483.

*Tis not assign-
able for error;
that the person
who returned
the original was
not sheriff. vide
Com. Pleader.
3 B. 16. 2d Ed.
vol. 5. p. 301.
2 Bac. 218. post
1414.

ERROR upon a judgment given in the common pleas in trespass, for a close broken, upon default, writ of inquiry thereupon awarded and returned, and final judgment given there for the plaintiff. And now after the assignment of the general errors he saith further, that the said record is diminished in *non certificando breve originale inter partes praedictas de praedicto placito et retornam ejusdem brevis quod quidem breve originale vicecomiti Essex directum fuit et retorna- bile coram justiciariis dicti nuper regis apud Westmonasterium in octabis sancti Hilarii anno regni ejusdem nuper regis decimo tertio ac retorna in dorso brevis illius sive indorsamentum superinde scriptum ut hujusmodi retorna factum et scriptum fuit nomine cujusdam Petri Whitcombe armigeri tanquam vicecomitis dicti comitatus Essex ubi revera dicto tempore retornae ejusdem brevis originalis scilicet in eisdem octabis sancti Hilarii eodem anno decimo tertio quidam Edwardus Luther armiger fuit vicecomes comitatus Essex praedicti et non dictus Petrus Whitcombe, &c. et hoc paratus est verificare, &c.* Upon which a certiorari was awarded to the *custos brevium* of the common pleas, who returned the original, to which the name of *Whitcombe* was subscribed. And after two *scire facias's* *ad audiendum errores* returned *nihil*, the defendant in error pleaded, *in nullo est erratum*. And Mr. serjeant Hall for the plaintiff in the common pleas, and the defendant here in the error, objected, that this matter was not assignable for error. Against which it was argued by Mr. Raymond for the plaintiff in error, that it was assignable as error. And he said, that there was a difference between acts judicial and ministerial; for against the ministerial acts done by a sheriff or other officer, an averment may be. And of that opinion is *Popbam, Cro. Jac. 12. Arundel v. Arundel*. And he cited *Telo. 34.* as in point, where it is said, that though in case of the sheriff a man cannot aver contrary to what is returned, yet he may say, that he who has indorsed his name on the back of the writ, &c. was not sheriff. Because by the common law until the statute of 12 Ed. 2. c. 5. no sheriff nor officer used to put their names to their returns; and so this averment, that he who made the return is not the true officer, is not taken away by the statute, but remains as a thing at common law. To the same purpose *Mich. 8 Hen. 4. 14. 20 Mich. 9. Hen. 4. 1 Hil. 10 Hen. 4. 7. b. Hil. 11 Hen. 4. 52. Pasch. 11 Hen. 4. 65. b. Trin. 11 Hen. 4. 92, 93.* The same diversity, 7 Hen. 7. 4. So *Cro. Car. 421. 1 Roll. Abr. 758.* Error upon a judgment of the common pleas in formedon, the error assigned was, that the *venire facias* was returned by Sir Richard Saltingston sheriff of Essex in *crastino Martini* 9 Car. 1. And that A. Smith was then sheriff; the defendant pleaded, that Sir Richard Saltingston was sheriff before the return of the writ, created by letters patent

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patent of the king. *prout patet de recordo*; nul tiel record was pleaded to it; and the letters patent were produced; and it was moved in *B. R.* that this matter ought to be tried by the county, because it might be, that Sir Richard Saltingston was discharged before the day of the return of the writ; *sed non allocatur*; because that shall not be intended; and the judgment was affirmed. But there no exception was taken, that this matter was not assignable as error; but the said case seems to admit, that it was assignable as error. So *Pasch. 1649. B. C. Baxtofte v. Richards. 1 Roll. Abr. 760 lit. A. pl. 3.* Error upon a judgment in *C. B.* the plaintiff assigned error, that where a *venire facias* was returned by J. S. sheriff of the city of *Exeter*; this error is not well assigned, because the *venire facias* is not certified, upon which the error is assigned; but it should have been certified, and afterwards a certificate to aver that he was not sheriff; which admits such matter to be assignable for error. Farther it has been adjudged, that a man may assign error, that the judge before whom the judgment was given was not judge; as *T. Jones 81. 2 Lev. 184. Hippisley v. Tucke.* Error upon a judgment in the court of *Newbury* before the mayor; the error was assigned, that the mayor had not taken the oaths. So *T. Jones 137. Deveney v. Norris. 2 Lev. 242.* reports the resolution in the said case contrary to *T. Jones*; but it is very probable, that Sir *T. Jones*, who was one of the judges then, has reported it more exactly than *Levinz*, who was then but counsel. So *Gro. Eliz. 320. Walsh v. Collinger. Sed non allocatur.* For per Holt chief justice, the case of *Deveney v. Norris* is not well reported in *Jones*, but exactly by *Levinz*; for there the judgment was affirmed. And he said, that he was counsel in the said case, and the court held there, that since the defendant had admitted the judge to be a judge, by a plea to the action, he was estopped to say that he was not a judge afterwards. And he denied the case of *Hippisley v. Tucke* to be law; though there is a difference between the two cases; for in that of *Deveney v. Norris* there was a replication by way of estoppel to the assignment of errors. And (by him) when a writ is returned, the defendant has all the same term to make complaint of any irregularity concerning it, or the execution of it; as the sheriff has also all the same term, to disavow the return. But if the defendant permits the term to pass without application made to the court, and the return is filed, and made a record of the court, every one is estopped to say, that the person who returned it was not sheriff. But further it can never be assigned for error in case of an original writ, because the defendant might have pleaded it. There would have been more colour, if it had been a return of a writ of inquiry, because the defendant would have been out of court, and had not day to plead: but as afore is said, it cannot be assigned for error. As to the case of the *venire facias*, if it be returned by a man who is

not

*Tis not assignable for error that the party who sat as judge in the court below was not a legal judge. Where a writ is returned the party has the whole term to complain of any irregularity in the execution, or the return. *S. P. Holt 274. Salk. 165. vide 1 T. R. 191, 192.* and the sheriff may during that time disavow the return. *S. P. Holt 274. Salk. 165.* *Tis not assignable for error that the person who returned the writ of inquiry was not sheriff,

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or the person
who returned
the venirefacias.
S. P. Salk. 265.

not sheriff, it is not assignable as error, because the party might have challenged the array for that fault at *nisi prius*; and therefore it is not assignable, that the sheriff was out of the realm, and had no deputy, as in the case in *Hen. 4.* because it was a good challenge to the inquest. He said also, that the case in *Croke and Rolle*, which concluded, *prout patet per recordum*, was not well pleaded. All the court agreed with *Holt*, and judgment was affirmed. Note, Mr. serjeant *Hall* cited *Cro. Jac.* 188. 13 Co. 8. *Trin.* 9 *Edw. 4.* 19. *Dier* 65. *Bro. error* 2. to prove, that the process is void, if it hath not the name of the sheriff. 21 *Hen. 8.* 3. *Cro. Car.* 224, 258. *Cro. Eliz.* 655. 1 *Sid.* 94.

Regina *vers.* Rhodes and Cole.

Upon a general verdict for the crown on an information for subornation of perjury, tho' some of the assignments were bad, yet if any of them was good, the court must give judgment for the crown. D. acc. Salk. 384. pl. 36, and vide *Dougl.* 703.

The words "in the county aforesaid" if several counties are mentioned before, shall in an action be taken *prima facie* to refer to the county in the margin. R. acc. Bl. 847. 3 Will. 339. vide ante 258.

In an indictment not.

Vide post 1304.

On an information in Middlesex for subornation of perjury stating that A. late of, &c. in the county of Surrey impleaded B. for that whereas he was indebted to him in the parish of St. Clements Danes in the county aforesaid, &c. and that the cause was duly tried at the sittings in Middlesex, the court cannot take the words in the county aforesaid to refer to Middlesex. Vide *Cowp.* 683. *Dougl.* 184. In such an information an allegation that the defendant procured, or that he persuaded the party to swear, implies that he did swear on such procurement or persuasion. In such an information 'tis sufficient to state that the defendant by *finister* means procured the party to swear, without specifying what those means were. To make false swearing perjury, it is not necessary that the matter sworn should be decisive upon the point in question, it is sufficient if it was material. D. acc. ante 258. vide 1. *Hawk. c.* 69. f. 3.

But

AN information for subornation of perjury. The information set forth, *quod cum in curia domini regis coram ipso rege apud Westmonasterium in comitatu Middlesex Rhodes nuper de D. in comitatu Surrey oatmeal maker implacitasset Holford, pro eo quod cum indebitatus fuit to the plaintiff in parochia sancti Clementis Dacorum in comitatu prædicto in so much money for goods sold, and promised to pay, &c. and whereas also upon an account stated between the plaintiff and defendant, the defendant was found in arrears so much, and promised to pay it, &c. and the defendant pleaded not guilty, and the cause came to trial, et triatio exitus prædicti debite habita fuit per juratam patriæ debite impanellatam, juratam, et oneratam, before my lord chief justice Holt at the sittings in Middlesex; and the defendants did per finistros labores, media, et procuraciones persuade and procure one J. S. to swear, that he was present when an account was stated between them, and so much agreed to be due; and the defendant paid part; and several other matters were laid to be sworn; ubi revera, et in facto, there was never any account stated between them, nor any of these matters were true. And upon not guilty pleaded, the defendant was found guilty. And Mr. Weld moved in arrest of judgment. And, 1. He took exception to several of the assignments of the perjuries, and he compared the case to the case of general damages, where one count is insufficient, that will vitiate the whole. So here the defendant being to be fined upon the whole information, and that fine being intire, if any of the assignments of the perjury are wrong, the court will arrest judgment.*

But *Holt* and the whole court were of the contrary opinion, that if all the assignments of the perjuries were wrong, but one, yet that one would be sufficient for the court to give judgment upon against the defendant.

The second exception was, that the judge of *nisi prius* had no authority to try the cause; for that the cause of action was laid in *Surrey*, the *in comitatu prædicto* relating to *Surrey*, which is the next preceding county.

Mr. *Broderick* in answer said, that *ad proximum antecedens fiat relatio, nisi impediatur sententia*, but that if it did hinder the sense, it should be referred to the county in the margin; and for that he cited *Moore* 696, in case of an action, which was very like this, only not in case of an indictment; and 3 *Cro.* 465, where, as also in the case in *Moore*, the county next preceding was, as it is in this case, mentioned only by way of addition, and the judges referred in *comitatu prædicto* to the county in the margin; but that was in an action too: and the reason given was, because, when there was no necessary relation, they would make such construction as should preserve the action. And he said, the rule ought not to be, as Mr. *Weld* had laid it down, that it ought to appear, that the judge of *nisi prius* had an authority; but if it did not appear upon the record that the judge had no authority, it would be well, for *semper præsumitur pro sententia*: and the most that could be made of this would be, that it was uncertain in what county the action was laid, there being two counties mentioned before, to either of which the *prædicto* might relate; and therefore the court would presume the action was laid in *Middlesex*, which would support the information, and not that it was laid in *Surrey*, to destroy it.

Mr. *Mountague* said farther, that as it stands indifferent, the averment that the trial was *debite habita*, now it is found by verdict, will help it; otherwise, if it appeared upon the record itself, that the judge of *nisi prius* had no power. That it was a common thing in *Latin* to put the word governed before the word governing, and therefore the court will so dispose the words in the construction of them, as to make them sense; and so will make it, *quod cum Rhodes nuper de B. in comitatu Surrey oatmeal maker implacitasset Holford in curia domini regis coram ipso rege, apud Westmonasterium in comitatu Middlesex, pro eo quod cum indebitatus fuit to the plaintiff apud le parish de St. Clement's Danes in comitatu prædicto*, and then that would refer to *Middlesex*, and so all well.

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Holt chief justice. There is a difference between actions and indictments; if this had been an action, and the plaintiff had declared thus, and *Middlesex* had been in the margin, it must have referred to that county; and the reason is, because *Middlesex* in the margin, stands there to denote the county in which the action is laid; and therefore though a county be mentioned in the declaration for a particular purpose, as for an addition of one of the parties for the purpose, before the *venue*, yet the *comitatu prædicto* in the *venue* shall not relate to that, but to the county in the margin, which was put there for that purpose. But now here is no *Middlesex* in the margin, and the matter as to *Middlesex* upon this record is nothing but that *Holford* was sued in the king's bench in *Middlesex*, which might be, though the action were laid in *Surrey*; and *St. Clement's Danes* where the contract is laid, might be in *Surrey*. Then what construction shall be made? Why relation must always be to the next antecedent, unless the sense hinders; which how does it in this case, to suppose the defendant *Holford* indebted there; and as I remember, the difference is between actions and indictments. 3 Cro. 101, 184.

(a) R. acc.
ante 405.

But if the *prædicto* does not necessarily relate to *Surrey*, but stands indifferent; then it must (a) not be taken to be *Middlesex*, upon the account of the averment that the trial *debite habita fuit*, which it could not be, if *St. Clement's Danes* were in *Surrey* and not in *Middlesex*; for then the trial was void.

Powell. *Eodem* always refers to the next antecedent, but (b) not *prædicto*. It is incertain what that relates to, and here is nothing for it to relate to, one thing more than another. It can't relate to *Surrey*, because that is put in only as the addition of the defendant in the action, and *Middlesex* is only put in for the place where the court was held. And *Middlesex* in the margin, in the case of indictments, is only put for the county where the indictment is found. And that is the reason of the difference between indictments and actions, in the last of which it is put for the county where the action is laid; and therefore the *prædicto* in an action shall relate to the county in the margin. But it does not appear now here upon this information, that there was any *Middlesex* in the margin, and therefore this is uncertain. But nothing ties it up to *Surrey*, and for any thing that appears, the judge of *nisi prius* might have jurisdiction, and therefore when *non constat* whether he had or no, the averment that the trial *debite habita fuit* will cure it.

Mr. *Weld* took another exception; that the information was, that the defendants persuaded J. S. but it was not

(b) This word ought according to the context to be omitted.

said,

said, he did it upon their persuasion. For it might be, that he might repent of his first resolution, and then another person might come and persuade him, and upon that persuasion he might do it. And he compared it to *Vaux's* case, where the indictment was held to be naught for want of saying, *venenum prædictum*, after the *recepit et bibit*, though it says before, how he persuaded him to drink the poison, and after that, *immediate post receptionem veneni prædicti obiit*.

To which it was answered by the court, that the information was, that they procured him, which necessarily implies an act done.

And *Holt* chief justice said, that persuaded implied an act done, for else the witness could not be said to be persuaded. For a man does not persuade, till he has the effect of his persuasion. And he agreed *Vaux's* case. And he said, that Mr. *Weld's* case was not to be intended, but if it could be intended, yet the first persuasion should be intended to prevail in the case, and should give the first persuader a share of the guilt. Then Mr. *Weld* took another exception; that it was too general to say, that *per sinistros labores, media, et procuraciones*, he procured him to forswear himself; but the information ought to shew in particular, how it was brought about; and he compared it to the case of an indictment of murder, where the weapon, &c. is all set out in certainty.

Holt said it would be good in an indictment for an accessory to a murder.

Powell. All the precedents are thus. Besides the information says, he procured J. S. to do it, which shews, that the act was done; and then *per sinistros, &c.* will not hurt.

Mr. *Weld* took another exception; that the sum the witness swore was due upon the account, was different from the sum, for which the plaintiff had declared; and therefore was not evidence in this cause, because upon the *insimul computasset* the plaintiff can't vary from the sum laid in his declaration. And *Broderick* answered, and *Holt* took the difference, that it is not necessary, that the evidence be sufficient for the plaintiff to recover upon: it is enough if it be circumstantial evidence. And in the nature of the thing an evidence may be very material, and yet it may not be full enough, to prove directly the point in question. And it is always sufficient in indictments of perjury, to say that the defendant swore so and so *de materia in exitu*, and it has been always held so in my time.

Powell

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Powell agreed the same difference, and said, though this evidence did not prove fully the *insimul computasset*, yet it was very material evidence, that they accounted together.

Afterwards the judgment was arrested on the point of the authority of the judge that tried the cause.

Intr. Pasch. 2
Ann. Rot. 8.

Regina *vers.* Carter.

AN indictment was found against the defendant, for having taken and carried away so many malt tickets. And motion was made that it should be quashed, because it does not say, from whom they were taken, nor to whom they belonged. And it was granted. And the indictment was quashed.

Intr. Trin. 1
Ann. B. R.
Rot. 470.

Jose *vers.* Mills.

S. C. Salk. 640. 6 Mod. 14.

A declaration for taking away chattels must in general shew expressly that they belonged to the plaintiff. R. acc. ante 239.

In a declaration for taking away particular goods found and being at D. and also 100 bushels of wheat of the goods and chattels of the plaintiff, the words of the goods and chattels of the plaintiff can only apply to the 100 bushels of wheat.

In trespass if the defendant justifies, and the plaintiff demurs to his plea, and takes conditional damages, if those damages are intire and any of the trespasses are ill laid, the judgment shall be arrested as to the whole. Vide 3 T. R. 435.

TRespass, *quare* the defendant the close of the plaintiff *apud D. fregit*, and such and such goods *apud D. prædictum* in the said close of the plaintiff *existentia et inventa, et centum congios tritici tritirati, Anglice ground, de bonis propriis* of the plaintiff, *ad tunc et ibidem similiter inventi & existentis cepit et asportavit*. There were also other trespasses laid in the declaration, and to them the defendant pleaded not guilty. But to the first trespass he pleaded a taking for a distress for rent, upon which there was a demurrer. The issue being first tried a verdict was for the defendant, but the jury found conditional damages for the plaintiff, if judgment should be for him on the demurrer. And the plea being ill pleaded, judgment on the demurrer was for the plaintiff. Whereupon Mr. Branthwaite moved in arrest of judgment, that the declaration was ill, because the first goods were not laid to be the plaintiff's goods; nor can it be helped by saying they were in the plaintiff's close. 2 Lev. 156. in point. *Terry v. Strudwicks*. 3 Bulstr. 303. Cro. Jac. 46. Yelv. 36. Trespass, *quare equum cepit a persona* of the plaintiff, and yet held naught. To which Mr. Ward and Mr. Southouse for the plaintiff answered, that the *de bonis propriis* should go to the whole, and cited 2 Ro. Ab. 250. p. 7. Trespass, *quare clausum fregit et mille careciatas soli ad valentiam 10l. et centum pecias maberemii ipsius querentis ad valentiam 200l. ad tunc et ibidem inventas cepit, &c.* There the same objection was took and enforced, because *ipsius querentis* coming before *ad valentiam* tied it to the timber and yet it was held to go to the whole. But Mr. Branthwaite in answer to that case cited Raym. 395. Trespass for taking the mare *ipsius querentis, nec non bona & catalla sequentia*, and held nought for not repeating *ipsius querentis*: and 2 Saun. 370. the reason of which case is, because the sentences are different, and so the *de bonis propriis* can't be carried to all, of which opinion was the court. And Holt and Powell said, that the addition of the place closed up the sentence, and that

that they could not leave out those words, though if they had been out, the count would have been good. *Powys* justice held the case in *Raym.* to be the case in point, because, by him, the words in the middle may as well be carried forward, as the words at the end backward. [Note, in 1 *Saund.* 60. *Gainsford vers. Griffith*, 'tis held otherwise.] *Gould* justice agreed the case in 2 *Ro. Abr.* but said, that would not warrant this case, because the *et* coupled all together; but *quaere* of that. Then *Holt* chief justice said, that the plaintiff ought to have judgment for the goods well laid, the trespasses being several. 2 *Saund.* 379. *Pinkney vers.* the inhabitants of East Hundred in *Rutland*. But to this Mr. *Branthwaite* answered, that the conditional damages were given intire, and therefore the whole judgment ought to be arrested. *Holt* said, if that were so the judgment ought to be entred special, viz. upon the verdict for the defendant; and as to the rest, that judgment was arrested, because the damages were given intire. But in order that it might be seen how the damages were found, the *posse* not being in court, the cause was adjourned.

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Green vers. Waller.

Intr. Hil. 13
W. 3 B. R.
Rot. 20.

DE B T on a bond. The defendant craved oyer of the condition, which was, that if the defendant should answer the determination of the law touching such a ship and goods, and in case the law should adjudge the said ship and goods to be prize, or otherwise forfeited, if then the defendant should deliver the said ship and goods to the plaintiff; that then, &c. The defendant pleaded, that the law did not adjudge the said ship and goods to be prize, or otherwise forfeited. The plaintiff replied, that this ship and goods were condemned in the admiralty of England to be prize and assigns a breach, that the defendant had not delivered the said ship and goods, *et hoc paratus est verificare*; and at the end of his plea makes a *profert in curia* of the

In debt upon a bond conditioned to deliver up certain goods if the law should adjudge them to be prize, if the defendant pleads that the law had not adjudged them prize, he admits that he has not delivered them, and therefore the plaintiff need not allege that in his replication. Vide ante. 108. and

the cases there cited. Upon pleading an adjudication in the admiralty court, 'tis not necessary to make a *profert* of the sentence. Vide ante. 253. And a *profert* of an exemplification of the sentence will be superfluous. Vide Co. Litt. 225. b. 5 Co. 53. A judgment that the party *recuparet*, instead of *recuperet*, is bad. R. acc. 2 Will. 16. acc. 1 Roll. Abr. 771. pl. 23. Vide Str. 1132. 1156. If there are two distinct judgments upon a record, one of them may be reversed for error, and the other stand good. R. acc. post. 1532. Str. 1288. 807. 971. D. acc. Bur. 1791. sed vide ante 870. If a judgment is affirmed upon error with costs, and the judgment as to the costs is afterwards reversed, and whether the court which reverses it may not make an allowance for those costs, giving day to the parties improperly is a miscontinuance only, not a discontinuance. A miscontinuance is cured by the appearance of the parties. Tho' one of the parties has the appellation of Captain prefixed to his name in the placita, yet if it is omitted in the declaration, it shall be considered as part of his descripton only, not as part of his name.

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Sentence,

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sentence, under the great seal of the admiralty. The defendant craves *oyer* of the sentence, and the exemplification of the sentence was set out *in hæc verba*: to which the defendant demurs. This action was brought in the common pleas in *Ireland*, and judgment was there given for the plaintiff. On error brought, that judgment was affirmed in the king's bench in *Ireland*, on which judgment error was now brought here.

And the exceptions which were taken to the replication by Mr. Ward were, that by making a *proferri* of the sentence, the plaintiff had deprived the defendant of taking issue upon the sentence; and yet when he comes upon *oyer* demanded to set out the sentence, he pleads only an exemplification of it, which is not pleadable; but if it were, does not prove the plaintiff's replication, being varying in many particulars from the ship and goods mentioned in the condition of the bond; and so does not prove the law has made any determination as to them. And besides, it does not appear in the sentence, that the capture was upon the high sea, and consequently the admiralty had no jurisdiction; and then also there is no legal determination, and that the breach was not well assigned.

Holt chief justice. By pleading that the law has made no determination, the defendant has confessed, that he has not re-delivered them, and therefore the plaintiff need not assign a breach; and it is not like the case of an award,

(a) Vide ante
208. and the
cases there cited.

(a) which is a single case, and stands by itself.

As to the *proferri*, the defendant needed not have made it, because it is no deed, but only a judicial determination in a court not of record, and though he did make a *proferri*, he needed not have set it out: and notwithstanding the *proferri*, the defendant might have traversed the sentence; and then the *quære* is, whether this impertinent matter will hurt, or lessen the strength of a good and substantial replication? for this is not the sentence, though it be called so; but mere idle impertinent matter, which shall never hurt a good replication well averred.

Powell. You should have traversed the adjudication, which they gave you a fair opportunity to do; and then if the ship had not been the same, or the matter did not arise within their jurisdiction, or the sentence had been void, and the issue had been for you: but when you have not thought fit to do that, but waved it, this matter of the sentence, which is mere surplusage impertinent and out of the case, shall never hurt a replication, which for all the rest is good.

Holt

Holt chief justice said, though the defendant might have denied, that there was any such sentence, yet the exemplification of the sentence under the seal of the court would have been conclusive evidence. As, according to *Hensloe's* case, it is necessary for an executor to maintain an action, to produce the probate of the will under the seal of the ecclesiastical court, and yet notwithstanding the probate produced under the seal of the court, the defendant may plead that the will was never proved: but upon issue upon the probate, the (a) probate under the seal of the court will be conclusive evidence: and so it was adjudged by my lord chief justice *Kelynge* upon such a case in his time, which is reported in *Lev.* But the counsel not being satisfied with it, moved the court, and they all agreed with my lord chief justice *Kelynge*. In the case of *Hughes v. Cornelius*, in which I was of counsel with the plaintiff in my lord *Hale's* time, an *English* ship was taken in the time of the *Dutch* war, and condemned as a *Dutch* ship in the admiralty of *France*, and sold to the plaintiff; and in an action of *trover* brought by him for the ship upon a trial before my lord chief justice *Hale*, the sentence of the admiralty of *France* was produced under seal of the court, and all this matter was found specially; and although the fact was found to be contrary and falsifying the sentence in the admiralty of *France*, yet that sentence was held to bind the property of the goods, and the plaintiff recovered.

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The exemplification of a sentence in the admiralty is conclusive evidence of the point decided by the sentence.
D. acc. Dougl. 590, and vide Dougl. 554.
Cowp. 318. 322.
(a) D. acc. ante 262. and see the cases there cited.
Cowp. 596.

Then Mr. *Ward* took an exception, that the judgment in the king's bench in *Ireland* was *ideo consideratum est quod* the plaintiff *recuperaret* for *recuperet*, which was ill, being a wrong tense; and cited 1 *Ro. Abr.* 771. n. 23. in point, and the court agreed it to be error, but that it would only reverse the judgment of the king's bench in *Ireland* *quoad* the costs given upon the affirmance; but the judgment of affirmance would stand, being a distinct judgment; and accordingly they reversed the judgment of the king's bench in *Ireland* *quoad* the costs, and affirmed the judgment *quoad* the affirmance. And Holt chief justice seemed to say, that they might consider here upon the writ of error the costs in the king's bench in *Ireland*. *Sed quaere.*

Then Mr. *Ward* took another exception, that there was a discontinuance in the king's bench, the continuance being *apud* the king's courts *ubicunque*, which is as if a continuance should be *here apud Westmonasterium ubicunque*; whereas it should be *coram domina regina ubicunque*, which is the stile of the court.

But Holt chief justice said, that day being given to the parties, this was but a miscontinuance, and could not be

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a discontinuance, and that miscontinuances are helped by an appearance. And he said, that where the proceedings are by bill, the continuances are *coram domino rege apud Westmonasterium*, where by original *coram domino rege ubicunque*.

Mr. Ward took another exception, that the writ of error was of a plea *inter Green et Jacobum Waller*, and the *placita* was *Capit. Jacobum Waller*, which was another person, for *Capit.* must be taken to be part of his name, otherwise, if *Capit.* had followed after *Jacobus Waller*.

Holt said, that in the bond, and other proceedings, he was called captain, and yet when he comes to declare, he calls himself only *Jacobus Waller*, which shews that captain cannot be part of his name.

Powell agreed, that it could not be taken to be part of his name, and that he must be taken to be the same person.

The judgment of affirmance in the king's bench in *Ireland* was affirmed *quoad* the affirmance, and reversed *quoad* the costs, *nisi*, &c. Mr. Bynderick counsel with the defendant in error.

Trinity Term

2 Annæ reginæ, B. R. 1703.

Herbert et alii *vers.* Burstow.

ERROR of a judgment in the common pleas in *assumpsit*, where the plaintiff declared, that the defendant, in consideration that the plaintiff *solveret et deliberaret* to the defendant so many pieces of hammered money, promised to pay, &c. On *non assumpsit* pleaded, verdict and judgment for the plaintiff. Mr. Salkeld for the plaintiff in error first urged, that here was no consideration, because *solveret et deliberaret* implied no more than a bare giving a possession of the pieces, &c. but not a transferring of the property. The court on the other hand, that it implied a transferring of the property. The second error was, that after the entry of the *postea* comes immediately, *ideo consideratum est*, &c. and does not say where, nor by whom, so that it must be took to be the judgment of the jury. The court on the other hand, that this was the constant form of entries in the common pleas, and the difference is between judgments of superior and inferior courts; in the last it must be said *per eandem curiam*, otherwise in the first. The judgment was affirmed.

Contract to pay and deliver is a contract to transfer the property, not merely to give the possession. S. C. Salk. 25.

A judgment in C. B. need not specify where or by whom it was given.

Sir John Parsons *vers.* Gill.

THE defendant gave a warrant of attorney the 2d of April 1701, to enter up a judgment against him of Hilary term before, or any other subsequent term. A judgment was entered accordingly, and in entering it up, the memorandum was; that in Hilary term *coram domina regina apud Westmonasterium venit* the plaintiff *at protulit*, &c. And the bill was an *indebitatus assumpsit* upon a *mutuatus*, and the *mutuatus* was laid the 2d of April 1701, the day the warrant of attorney bore date, which was after Hilary term 1700, plea roll will warrant the court in amending a judgment by stating that the

The record of a judgment may be amended by the judgment paper. S. C. Salk. 50. vide 6 Mod. 165. vide Dougl. 109. *Qu.* Whether the entry of the warrants of attorney on the parties appeared

by attorney. S. C. Salk. 88. vide Bl. 453.

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of which the judgment was entred, and a writ of error was brought upon this judgment *in camera seaccarii*. And now Mr. *Ward* moved the court to amend this record by the judgment paper, upon which the *mutuatus* appeared to be right of the 2d of January 1700; and it was also entred upon the bottom of the judgment paper, *J. S. pro querente, J. N. pro defendente*. And also upon the top of the roll the warrants of attorney were entred, *viz. Querens ponit loco suo J. S. &c. and defendens ponit loco suo J. N. &c.* And he insisted, that the court might amend a record by the instructions given to the clerk, as in 1 Cro. 147. *Hutton* 83. In debt upon a bond against an heir, the court added the word *haeredes*; because it was *vitium clerici*, he having the bond before him: that amendments had been made in the common pleas by the book the prothonotaries keep of entries of judgments. *Hob. 127. 1 Brownl. 16.* So amendments have been made by the paper book, 1 Cro. 144. And in *Hil. 8 Will. 3. R. R. Sir Roger Pulaflon v. Warburton. Salk. 48.* The court seemed to agree, that in ejectment, if the declarations delivered in the country were right, they would be a sufficient warrant to amend the declaration upon record by, and therefore as they would amend by these, so they would in this, and amend by the paper upon which the master signs the judgment, and make the *mutuatus* agree to that of the 2d of January 1700.

As to the second thing to be amended, *viz. to put in per J. S. attornatum suum*, he argued, that the warrant of attorney entred upon the top of the plea-roll was sufficient warrant to amend that by: that the warrants of attorney were never filed in this court, but that anciently the way was to enter such a one *ponit loco suo* such a one, &c. upon a distinct roll; but that in the time of lord chief justice *Wright*, that course was altered, and it was entered as it is now upon the top of the plea-roll; and it being entered now upon the roll, that the plaintiff has made such an one his attorney, that shews plainly to the court, that he sues by attorney; and is a sufficient warrant for the court to make this amendment by; and that the court had amended warrants of attorney. *Dier 105, 225. March 133.* that this was less than that; for the only *quære* here was, whether the attorney should be intended to continue, when the plaintiff has once made one, till he comes and appears expressly in proper person: that upon a claim of conusance or upon a writ of error the attorney continues. 21 *Edw. 3. 61.*

The attorney below does not continue attorney upon a writ of error without a new warrant.

Holt denied that the attorney continued upon the writ of error. And *Ward* said, that the amendment in this case ought rather to be favoured, because it was a proceeding by consent,

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consent, like the case of fines and common recoveries. 5 Co. 45. And he said that the entry of *J. S. pro querente* at the bottom of the declaration, was a further warrant to amend by.

Holt chief justice. As to the first mistake in the time of the *mutuatus*, that is a plain mistake, the book in the office has often been allowed to be a foundation to amend by. So here the paper upon which the master signed the judgment is right, and that was the warrant by which the attorney was to make up the roll, and therefore he held clearly, that ought to be amended. Book in the office foundation to amend by.

As to the other matter, that it did not appear, whether the plaintiff sued in person or by attorney, and therefore, whether the court should not add *per J. S. attornatum suum*. It is plain the suit was to be by attorney by the warrants, and therefore when it stands indifferently on record, whether he sued by attorney or no, it appearing he had an attorney, we must intend he sued by attorney. For to what end did he make an attorney, if he intended to sue in person. Besides it is the practice, if the plaintiff sue in person, to enter at the bottom of the declaration, *querens in propria persona*, or *defendens in propria persona*: and if one sues in person, the other by attorney: *querens in propria persona*: *J. N. pro defendente*, and therefore the judgment paper being *J. S. pro querente*, demonstrates that the plaintiff sued by attorney, and is a sufficient warrant to amend this as well as the other fault in the *mutuatus*.

Powys and *Gould* justices agreed with *Holt* in omnibus. *Powell* justice did also agree with him as to both amendments, taking the judgment paper for the reason. But he disagreed to the second amendment, taking the entry of the warrant of attorney on the plea roll for the foundation only, and putting the judgment paper out of the case, because though that proved the parties had attorneys in court, yet notwithstanding that, the plaintiff had election to sue either in person or by attorney, and that entry did not prove he sued by attorney, and therefore was no authority to amend by.

Both the amendments were granted upon the defendant in error's payment of costs, and consenting that the judgment should be affirmed without costs, because there was a good error at the time of the error brought.

An award that one party should pay the other 50 l. and that the other should thereupon release to him all actions touching the premises is sufficiently mutual.

An allegation that money had not been paid to J. S. excludes the idea of a payment to his assigns.

Semb. acc. Str. 231. post 1215. 1216.

DEBT on a bond. Condition to perform an award which was, that the defendant should pay to the plaintiff or his assigns 50 l. *et superinde* the plaintiff should seal a release to him of all actions and controversies *tangen' præmissa*. Mr. Chesbire for the defendant took exception, the award was not mutual; for the 50 l. being awarded to be paid generally, and the release, which was all the defendant was to have, being only of all actions *tangen' præmissa*, that should be took to relate only to the 50 l. and not to the controversies submitted. The court on the contrary: that it should be understood of the controversies. 2. It is not said, the defendant did not pay to the plaintiff's assigns, which it ought. 2 Sid. 41. Cro. El. 348. The court contrary: because they held payment to the plaintiff's assigns had been payment to the plaintiff himself; otherwise in the case in 1 Cro: El. for not repairing, because the thing demised there was demisable over. Judgment for the plaintiff.

Dillon *vers.* Harpur.

Intr. Pasch. 2 Ann. B. R. Rot. 25.

Two negatives in a plea pleaded in Latin must amount to an affirmative. S. C. Salk. 328.

A custom that nullus attornatus non debet implacitari but in his own court implies that some attornies ought to be sued elsewhere. S. C. Salk. 328.

And if an attorney of C. B. states such a custom in order to get rid of an action in another court, that court will not take notice of his privilege as such attorney. See *vide ante*, 869.

CASE. The defendant being an attorney of the common pleas, pleaded his privilege, and he laid the prescription, that time out of mind, *nullus hujusmodi attornatus non debet implacitari, &c.* but in the common pleas, except for treasons, &c. The plaintiff demurred specially, and shewed several things for cause, none of which would hold as good exceptions. But the fault that Mr. Raymond insisted upon in the plea was, that in laying the prescription, the two negatives amounted to an affirmative, *viz.* that some attornies in the common pleas were suable elsewhere than in the common pleas, and for any thing that appeared to the contrary this defendant might be one of them. To which the court agreed. But then Holt chief justice said, it would be a *quære*, whether, since the defendant has alleged himself to be an attorney of the common pleas, the law does not say he ought to be sued there without laying a custom, and so this custom as alleged here should be rejected as surplusage. And upon that it was adjourned. And at another day Mr. Southouse for the defendant urged first, that two negatives in law did not make an affirmative. *Litt. sect. 220, 362.* to which Mr. Raymond answered, that those were cases of grants, wherein the law regards the intent of the parties. But pleas (especially those to the jurisdiction, &c. as this is) are always took more strictly, *quod fuit concessum per Powell, Powys*

Powys and *Gould* justices, *absente Holt* chief justice. And *Powell* justice said, that since pleadings must be in *Latin* by the act of *Edw. 2.* they must be construed according to the rules for the construction of *Latin*. Then Mr. *Southouse* urg'd, that the court would take notice, that the attornies of the common pleas had privilege of being sued there, and reject the custom as pleaded as surplufage. But by the three justices, whatsoever they would have done had it stood indifferent, now they would not take notice of a privilege expressly contrary to what the defendant has alledged in his plea. And therefore they gave judgment, that the defendant should answer over.

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Sheer *vers.* Brown.

S. C. Salk. 26. 3 Salk. 17.

ERROR on a judgment given in the common pleas by *nil dicit* in an *assumpsit* for goods sold and delivered, among other counts, and intire damages on the writ of inquiry. The error assign'd was, that in the declaration the plaintiff says, that the defendant being indebted to him in so much money for goods, sold and delivered, *in consideration inde super se assumpsit*, and does not say that the defendant assumed, and therefore that the declaration was ill. And to prove this, *Law v. Saunders, Cro. Eliz. 913. Noy 50.* and *Lopdell vers. Hart, intr. Pasch. 1 Will. 3. B. R. and 2 Ventr. 196.* were cited. But *Holt* chief justice being present when this was first stirred, held it clearly well; and said he had forgot the case of *Lopdell v. Hart*, but supposed if it were so adjudg'd, there were three persons mentioned before in the count. Upon which it was adjourn'd. And being stirr'd at another day (*Holt* chief justice being absent) *Powell* justice said, that the case in *Cro. Eliz. 913.* was so adjudg'd, because there were three persons mentioned in the count, and then *non constat* which of the two besides the plaintiff made the promise, and therefore it is uncertain; but in this case there is only the plaintiff and defendant mentioned. As to *2 Ventr. 196.* that was adjudg'd on a motion without debate, and against *Ventris's* opinion, and that in a case in the common pleas about two or three years ago this exception was took and considered, and *2 Ventr.* considered, and the exception over-ruled; and the case in *2 Ventr.* held not to be law by the whole court of common pleas. It must be took to be that the defendant promis'd. If it is translated, it is, that he promised, which must refer to the defendant, that went last before. *Gould* justice said, that the difference was between a collateral promise, and one that arises by operation of law: and cited *Buckler vers. Angell, 1 Lev. 164.* and *Moilson vers. Russell*, judgment was affirm'd by the three justices, *Holt* being absent.

Upon a count in *assumpsit*, if no other person is mentioned than the plaintiff and defendant, it shall be taken that the defendant promised, tho' his name is not expressly set as the nominative case to the word *assumpsit*. *R. acc. 2 Keb. 715. q. v.*

Vide ante 145. post. 1156. If any other person is mentioned in the count, it is otherwise.

A man who is convicted by a justice cannot plead to that conviction when removed into B. R. by certiorari. S. C. Salk. 181. 3 Salk. 217. R. cont. Cro. El. 821. Semb. acc. Bl. 1209. and vide Bl. 1210. Freem. 334.

If a statute authorizes a justice to convict for the offence of cutting down trees, and to award the party grieved a recompence, the conviction must specify the number of trees cut down. S. C. Salk. 181. 3 Salk. 217.

If a place is stated to be in a particular county, the whole of it shall be taken to be in that county.

A Conviction upon the statute of the 43 E. c. 7. s. 1. against robbing of orchards, cutting of trees, &c. The conviction sets forth, that whereas complaint hath been made to the justice of peace by Sir Robert Barnard of Brampton in the county of Huntington, that the defendant in the night-time cut down divers lime trees of the said Sir Robert Barnard at Brampton aforesaid, &c. the justice of peace awarded him to pay so much damages, and in the conviction Burnaby was styled gentleman. This conviction was removed by certiorari into the king's bench, and there the defendant upon the authority of the case in Cro. Eliz. 821. offered to put in a plea to the conviction, suggesting a title in the defendant, as I think it was a right of common; but after several days debate before and after Powell justice came up to the king's bench, the plea was refused by the opinion of the three judges, against Holt chief justice, who first started the point: whether such a plea might be received or not to the return of the certiorari.

Powell justice said, that there was never any such proceeding, for ought appeared, in this court, and therefore he would not consent to let in such a way of pleading to judgments, which would be of such mighty consequence, without some precedent to warrant it. If indeed any record or precedent of St. John's case could be found, he might have consented to it, but being no such could be found, he was against it. If they had jurisdiction, the act that vests that jurisdiction in them excludes us and every body else to call in question their judgment, or say any thing contrary to it: and if they had not jurisdiction, as I take it they have not where property is in question, then an action lies against the maker, and him that executes the conviction; and that is the party's proper remedy, and the proper method to bring this matter into question; and while he has that, there is no need for us to find out such a new and extraordinary remedy as this for him. Powys and Gould agreed with Powell.

A gentleman may be convicted under a statute importing in the title to be made to prevent certain misdemeanors in lewd and idle persons, reciting in the preamble

that such misdemeanors were frequently committed by lewd and mean persons, and enacting in the body that all and every such lewd person or persons who shall commit the misdemeanors, shall be convicted, and in certain cases whipped. S. C. Salk. 181.

was such a proceeding, though we have not a mathematical one. I agree, that if the matter of fact were within their jurisdiction, you shall never falsify the proceedings of the justices; but if the matter be out of their jurisdiction, then you all agree their proceedings may be falsified in an action; and why should we not rather to prevent actions against the justices suffer the parties to put in pleas to these convictions here, but especially seeing there can be no other remedy in this case. For now this conviction is come hither, no prohibition can go; whereas upon putting in such a suggestion as this while the conviction remained below, the parties might have a prohibition after conviction to stay the justice from proceeding upon it; for without doubt, if the defendant had but a colour of title, the justices of peace had no jurisdiction in the cause, and now the conviction is removed here, if it be good, and so be confirmed, then process issues out of this court upon the affirmance, and then no action will lie for the party against the officer who executes the process of this court. And therefore seeing we by our affirmance are to give the conviction this new strength, it seems reasonable we should have a power to examine into the matter of it by way of plea, that we may not set our stamp to that, that ought never to have been made at all.

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Where the matter of fact is within the jurisdiction of the justices, it shall not be falsified.

If a conviction is confirmed in B.R. and process awarded upon it there, no action will lie against the officer for executing it. Vide Com.

Pleader. 3 M. 24. 2d. Ed. Vol. 5. p. 357.

Then the court refusing the plea, Mr. Page and Mr. Broderick took exceptions to the conviction, first, that the conviction took notice of the defendant to be a gentleman, and that gentlemen are not within the statute, but only mean and idle persons, hedge-pullers, &c. And for that they cited the preamble of the statute, and also the 15 Car. 2. made for enforcing this act; and also whipping, which is the punishment inflicted by the statute, is so base as the law could never intend to inflict upon gentlemen. Secondly, that the conviction was uncertain, first in not mentioning the number of the trees, which should have been done, as a measure for the justice to give damage by; secondly, in the place, at *Brampton* aforesaid, and *Brampton* might lie in two counties, and so the fact might be done in *Brampton* aforesaid, and yet not in the county of *Huntington*, and so out of the jurisdiction of the justice, and therefore the conviction should have said at *Brampton prædictam in comitatu prædicto*.

Holt chief justice. *Ployter's case* in 5 Co. 34. is express, that in trespasses the number and nature of things ought to be mentioned; if so in trespasses, much more in a conviction, where all imaginable certainty is requisite, the subject by this private jurisdiction executed by a single justice in a summary way being deprived of the privilege and benefit of the common law, and of being tried in the face of the country by the judgment of his peers. Besides the same reason

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reason that holds in trespasses holds here, viz. the ascertaining the damage, which by the statute the justice is to assess, and this conviction may be pleaded in bar of an action of trespass for the same trespass. And therefore for this reason *per totam curiam* the conviction was quashed. As to the exception, that the defendant was said to be a gentleman, the court over-ruled it, saying that if gentlemen will do base things, they must be liable to the punishment the law has appointed for such offences, and their quality will be but an aggravation. As to the place, they held, that *Brampton prædict.* must be took to be *Brampton in comitatu prædicto.* The conviction was quashed. *Ex relatione m^{ri} Jacob.*

Note. I was informed that the court did not give any positive opinion as to the plea, but that they seemed inclined as above, and that by the advice of the court the parties consented to try in an action, whether the defendant had any right or no in the place where, &c. But Sir Robert Barnard dying soon after the term, the suit fell.

Helliott against Mr. serjeant J. Selby.

If a man in justifying a trespass with cattle states that J. S. was on such a day rightfully and lawfully seised in fee of the manor of A. and granted a copyhold tenement to him and that by custom all the copyholders are intitled to common on the locus in quo, a traverse that J. S. was rightfully and lawfully seised in fee on the day mentioned in the statement, is bad. S. C. but with some difference. 3 Salk. 355. vide Com. Pleader. G. 15. 2d. Ed. vol. 5. p. 118. Str. 818. No objection can be taken upon demurrer to any inaccuracy in the recital of the original at the beginning of a declaration. S. C. Salk. 701. R. acc. Ann. 189. Barnard v. Moss. C. B. Cit. H. Bl. 250. vide Forst. 341. 4 Mod. 246. Str. 225. Gilb. C. B. 119. post. 1398.

Replevin. The defendant avowed the taking the cattle *damage feasant* in his freehold. The plaintiff in bar of the avowry pleaded that the duke of Buckingham was *rite et legitime* such a day seised in fee of the manor of W. whereof the place is, and time out of mind has been parcel, and then he lays a custom within the manor, for the copyholders to have common in the place where, and then sets out a grant of a copyhold tenement, &c. to himself from the duke, &c. The defendant replied, that the cattle were *damage feasant* in his freehold, *absque hoc*, that the duke was at the day in the bar mentioned *rite et legitime* seised in fee of the manor, and granted the copyhold estate to the plaintiff, &c. The plaintiff demurred. Mr. Raymond for the plaintiff took exception to the traverse. First, that the defendant ought not to have traversed the *rite et legitime*; nor secondly, the day of the seisin, because if the lord were a disseisor, the grant would be good, and the time of the seisin is not material, if it were before the grant. Mr. Weld for the defendant cited, *Dier* 365. a. pl. 32, 33. as a case that would govern this, where in replevin the defendant avowed as here; the plaintiff pleaded in bar, that he was seised in fee of *Blackacre* next adjoining to the place where, and the defendant, &c. was bound to repair the fences, &c. and for fault, &c. The defendant replied and traversed, *absque hoc*, that the plaintiff was seised in fee of *Blackacre*, &c. The defendant demurred. And resolved, that though the being seised of a precise estate of fee was not mate-

rial,

rial, nor consequently traversable; yet the plaintiff by pleading this precise estate had given the defendant the advantage of traversing it, though any interest would have maintained the bar to the avowry as well as a fee. So here. But the court agreed clearly, that the traverse was naught.

Then Mr. *Weld* took exception to the original, that it was nonsense; and that there was no such word as *averiarum*, the entry being in the memorandum, that the defendants *summoniti fuerunt ad respondendum* the plaintiff *de placito captionis et injuste detentionis averiarum, ea injuste detiner. contra vad. et pleg. &c.* and that there was no such word as *detiner*. But the court held it was not one jot material, the memorandum being no part of the declaration, and that if the original was naught, the way must be to take advantage of it by *oyer*; for this is but a recital, on which the king's bench can't judge. And he cited a case in this court, where in error on judgment of the common pleas in debt, the recital was *attachiatus* instead of *summonitus*, and it was urged to be error; the court held it to be but a recital, and that the way to take advantage of it was to allege diminution, and take a *certiorari*, and if the original returned was so, it would be error, and they would reverse it, but not as it is upon the bare recital. And when *Broderick* the last day of the term insisted upon it, that it was not taken notice of in 1 *Saund.* 317. nor the other reporter of that case, *Holt* chief justice remembered the case well himself, and it was as he reported it, and that *Twisden* justice said it was but recital. Judgment was given for the plaintiff.

The Countess of Banbury *vers.* Knolls and Wood.

IN a *homine replegiando*, the defendant prayed (a) *oyer* of the writ, and had it, and it was the *pluries*, and then pleaded in abatement a variance between the writ in the register and this, *viz.* that the words *ad ipsorum (viz. præsatae Mariae comitissae Banbury et Caroli Knolls, &c.) damnum non modicum et gravamen*, were left out, and to this the plaintiff demurr'd. And *per curiam*, the *pluries* complaining of the delay done to the plaintiff in not executing the first writ and the *alias*, those words *ad ipsorum damnum, &c.* would be a material part of the writ, otherwise on the *alias*; and therefore being a variance from the register in a point material, the writ must be abated. And so it was. *Holt* chief justice said, that the *homine replegiando*, and the *alias*, are *vicontiels* and not returnable, but the *pluries* is always returnable in the common pleas, or king's bench, and is the very writ the court holds plea upon. And he bid the counsel of the plaintiff consider, whether the countess of Banbury and Charles Knolls could be joined in one writ;

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Apluries homine replegiando is returnable. The first *homine replegiando* is not. *acc. post.* 987. *h.c.* is the *alias*. Therefore if it varies from the register in a material point, it may be abated. Q. Whether two persons can join in an *homine replegiando*. *Vide post* 987.

(a) *Ford v. Burnham*, Barnes 4to. Ed. 340. Dougl. 215. 459. 1. T. R.

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v.
KNOLLS.

Intr. Pasch. 2
Ann. B. R. Rot.
288.

In an action by the master on the statute of hue and cry for the robbery of his servant, the declaration may allege that the thieves robbed the servant, tho' it states that the master was in company.

If a statute provides that no action shall be brought for a particular cause until a certain number of days shall have elapsed from the time when it occurred and the declaration states merely that the number of days have now elapsed, no objection can be taken to it on this account on error.

Particularly if according to the day on which it is stated to have occurred, the number of days appeared to have

in the first writ it would be well enough, it not being returnable. But it is a question, whether it would be so in the *pluries*.

Willan *vers.* The Hundred of Stancliffe.

ERROR on a judgment given in the common pleas, in an action on the statute of hue and cry. 13 Ed. 1. ff. 2. c. 2. Mr. Broderick for the plaintiff took two exceptions to the count: first, that the master and servant were laid to be in company, and that the robbers *spoliaverunt* the servant, where it should have been the master, the goods being all the while in the master's possession, he being in company; and for this he cited *Style* 156, 319.

Holt chief justice agreed, that the goods were in point of law in the possession of the master, and that in an indictment of robbery against the thieves it would be well to say, that they robbed the master; but he said, that it would be well in a declaration to declare according to the truth of the fact, and leave the construction of the law to the judges. The second exception was, that it was said in the declaration *quadragesima dies jam præterierunt*, which refers to the time of the declaration; and so the original, for ought appears, might be sued out within forty days; and therefore he ought to have said, *quadragesima dies præterierunt* before the suit of the original. Mr. Chesbore for the defendants said, all the precedents were as this is, and compared it to the case in 3 Lev. 246. of *adhuc*, which is there held to refer to the time of the original.

Holt chief justice said, that they would take the robbery to have been committed the very day it is laid, and then it appears upon the count that the forty days were passed. That if they would take advantage of it upon the original, they should have craved *oyer* of it. And judgment was affirmed.

elapsed before the commencement of the suit.

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In an allegation quod quoddam breve regis emanasset & cancellaria sua (recitando &c.) per quod præcepit &c. the king shall be considered as the nominative case to præcepit. S. C. Com. 132.

In an action for a double return 'tis sufficient for the plaintiff to allege that he was duly elected, he need not state any thing to shew that the election was regular. S. C. Com. 132. And tho' the writ required the election of two persons, he need not shew that any other person was elected besides himself. But if the plaintiff takes upon himself to state the circumstances of the election, and it appears upon that statement to have been void. Q. if the declaration will not be bad. If an act is directed to be done at the next court, and it appears that such court was held on one day, and that the act was not done until a subsequent one, it may be presumed the court was adjourned from the one day to the other. And it shall be presumed after such a verdict has been given as could not properly have been given unless the act had been regular. In the sentence "on such a day of a particular month now next following," the word following will relate to the day, not to the month.

AN action upon the statute of the 7 & 8 W. 3. c. 7. for a double return. Upon not guilty pleaded, and a verdict for the plaintiff, it was now moved in arrest of judgment by Mr. Cooper. And the ground upon which he founded his exceptions was, that if it did not appear to the court, that there was a sufficient authority to make an election, and that that authority was well pursued, and a *fortiori* if it did not appear that it was not well pursued, then was there no person elected, and

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consequently no party grieved to bring an action, nor no action could lie upon this statute. And first, after the recital of the act of parliament in the declaration comes the writ, which is set out thus, *quod quoddam breve domini regis e cancellaria sua emanasset, vicecomitibus civitatis Coventriæ directum, per quod quidem breve (recitando quod cum de advisamento, &c.) vicecomitibus civitatis prædictæ præcepit firmiter injungendo, &c.* And so it does not appear who it was commanded, there being no nominative to *præcepit*, and so for ought appears there was no authority to make the election. Secondly, the writ commands, that he should make proclamation *de die et loco prædictis*, which refers to the day of the meeting of the parliament, which is the only time mentioned in the writ. And when the plaintiff in his declaration comes to shew how it was executed, he says only that proclamation was made of the time of election, but does not shew the proclamation of the time of meeting of the parliament. Thirdly, it did not appear the proclamation was made at the county court, much less at the next, the words being only *apud civitatem Coventriæ* and if that should be taken to be the next county court, then the election could not be at the next county court; for he tells you, that proclamation was made at the city of *Coventry* the fourth of *December*, that the election would be upon the ninth; and it was made accordingly the ninth, which could not be the next county court, for that was the fourth; and the county court being but one day in law, it must fall then, except it had been adjourned over to the ninth, which does not appear; and especially it being said to be the ninth of *December* then next following, which must be the *December* twelve-month. Like the case of *Jones v. Morley*, adjudged in this court *Hil. 9 W. 3. B. R. ante 287.* where a man in *Hilary* term covenanted to levy a fine next *Hilary* term; that was adjudged, must be understood *Hilary* term twelve month. The same objection goes to the election, it being only said to have been made *apud istam eandem civitatem*. Fourthly, it does not appear any body but himself was chosen, and he ought to have shewed two were chosen; for the writ commanding them to chuse two, if only one was chosen, the writ was ill pursued in substance, and consequently the election void, which is indeed the ground of all the other objections, the sheriffs being bound in all things strictly to pursue the directions of the writ; and if they vary from it, all their proceedings, as not being pursuant to their authority, are void, and consequently, the plaintiff not elected, which it is incumbent upon him to make himself out to be, to intitle himself to an action. To these objections it was answered by the counsel for the plaintiff, that as for the first, it must be understood the king commanded, and that it was the idiom of the *Latin* language not to repeat the nominative case, but the verb should be applied to such person named before, as best suited with the sense:

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sense: that it was a rule in the *syntaxis*, that in *verbis quorum significatio ad homines tantum pertinet, tertiæ personæ nominativus sæpe subauditur*: that the original writ in debt in the register was just as this, *præcipe J. S. quod reddat J. N. triginta libras, quas ei debet et injuste detinet, &c.* Where *J. S.* and *J. N.* are both dative cases, and yet the *Latin* is well, without repeating *quas J. S. ei debet*, though *J. S.* was never named before in the nominative case; and though *J. N.* be the substantive next going before, yet it is determined by the sense to *J. S.* To the rest of the objections they gave an answer, that nothing was incumbent upon them, but only to shew that they were duly elected; and that accordingly they had averred, that they were *debite modo* elected, that whether the sheriff proceeded regularly to the election in all the steps of it was not incumbent upon them to shew, as neither that other was elected; it was enough for them to shew themselves elected, which they had done, and that was now found with them. And Mr. solicitor said, that if the sheriff had proceeded to an election irregularly, yet he should not take advantage of his own wrong; for then he would have nothing to do, but to make any irregular step in the election, and he would be secure from an action, let him act as he would. Mr. Cowper replied, that what was good *Ciceronian Latin*, would not be good in a declaration, for that required more certainty. For the case of the writ he said, that was well enough; for the intention of a writ was to tell the matter shortly, and from thence it has the name of *breve*; but declarations must be more particular. He said, that the averment of *debite modo electus* was not sufficient, without shewing the manner of the election; and it was plain the plaintiff's counsel thought so, because they had set it out: but that if what he had observed was true, that it appeared that the sheriff had not pursued his authority, the averment, that the plaintiff was *debite modo electus*, could never make it good; because it was an averment contrary to what appeared in their own declaration: and if the court would refer *præcepit* to the words going before, there were two of them, the king and the chancery; and then it would be uncertain to which of them it should be referred. And if the sheriff proceeded irregularly, he might be punished in parliament, &c. but he could not be liable to an action upon the case for a double return.

Holt chief justice. The pronoun *ille* in the nominative case is often understood, where there is a word going before, to which it may relate: the case of the *præcipe quod reddat* is in point; *ille* is there understood, and has a relation to *J. S.* which went before. But then it is objected, that it is the nature of a writ to declare the matter shortly. But though it be the nature of a writ to tell the matter shortly, yet it must be *Latin*, and clear and plain, and good

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good sense. The writ need not indeed be so particular as the declaration; as in trespass, it is enough to say in the writ, *quare bona sua cepit*: but when you come to declare, you must mention the particulars. But then it is objected, that indeed this is good *Latin* in *Cicero*, but it is not good in a declaration. But sure what is good *Latin* in *Cicero* is good *Latin* in law. In the conclusion of a plea it is the constant way for us to say, *et hoc paratus est verificare*, without repeating the pronoun *ille*. So here, if you leave out the parenthesis, the words will run thus, *quoddam breve domini regis & cancellaria sua emanasset vicecomitibus civitatis Coventriae directum per quod quidem breve vicecomitibus civitatis praedictae praecepit firmiter injungendo*, &c. that must be, *ille praecepit*. But it is objected, that it is uncertain whether it should be *ille* or *illa*; that is, whether it should relate to the king or the chancery. But the chancery cannot command by a writ, but only the king; and all writs are in the king's name. The lord chancellor indeed sits in the court, and issues out the process; but it is the king who commands in the process, and it cannot be understood otherwise. And if this would be the sense of the words leaving out the parenthesis, it will be the sense of them with it in; for the parenthesis does not break the sense at all, nor will make it worse. But then it is objected secondly, that it does not appear here that there was a regular election. Nay, Mr. Cowper says, that it does not only not appear, that there was a regular election, but the contrary appears, *viz.* that it was irregular. But I think the contrary is true, for the election might be at the next county court, though it is not said that it was, for nothing appears to the court but that the county court might be adjourned; and since it might be so, why shall not we understand that it was so? But besides all this, it would have been enough for the plaintiff to have said in his declaration, that a writ was directed to the sheriffs, and that thereupon the sheriffs proceeded to an election, and that the plaintiff was *debito modo electus*, and he might have left out all this matter, about the manner of the election; and that which is in the declaration besides, leaving out all that matter, brings the plaintiff within the benefit of the statute, and he might have averred his conclusion, without shewing any premisses at all. And if he might have so done, then when nothing appears in these premisses to the contrary, why shall not we intend, that the election was well? But then Mr. Cowper objected, that it does not appear that two were chosen. Suppose the electors will choose but one, or they agree to choose one first, and then the other, and accordingly they choose the first well, and the second is a void election; the election of the one will not be void, because either another is not chose, or not well chose. Besides, this is an authority

Under a writ for the election of two persons, tho' the election is void as to the one, it may be good as to the other.

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(a) Acc. Co.
Litt. 181. b.(b) S. P. Com.
932.

to do two things; and if it be well executed as to one of them, the not executing of it as to the other will not avoid the execution of it as to the first. Like the case of a power of revocation; a man may revoke part only, or part at one time, and part at another: so here, the electors may choose one first, or one only, and not another, and authorities in execution of justice are favoured; and therefore if (a) a writ be directed to four bailiffs, two may execute it. Besides, it appears upon the writ that the sheriffs have returned two indentures, viz. one with Sir Christopher Hales and Hopkins, and the other with Hopkins and Neale. But suppose there were an irregularity in the execution of the writ, shall the sheriff take advantage of it? Since he has pretended to execute the writ, and make a return, he (b) shall never take advantage of any error in the proceedings.

Powell justice. Leaving out the parenthesis, the matter is plain, and it is the nature of a parenthesis to be left out. The chancery cannot command by a writ, it must be the king must command. There is more doubt upon the matter of the adjournment. I think, that if it had appeared upon the record, that the election was a void election, the plaintiff could not have maintained this action; but it does not appear, that the sheriff made proclamation of the time of the meeting of the parliament; but yet he might have done it, though it does not appear upon the writ, in which it is by no means necessary to set it out. It appears he made proclamation of the time of the election; but then it is said, it does not appear he made the election at the next county court. But nothing appears to the contrary. It is said, it does, because the proclamation was made upon the fourth, that the election would be upon the ninth, and then it was had; and therefore the county court being but one day in law, the ninth could not be the next county court, for that was the fourth. But the court might be adjourned; and if the election had not been at the next county court, the plaintiff could not have had a verdict. The plaintiff has nothing to do to shew another was elected; he has shewed, he was duly elected himself, and so he has made himself out to be the party grieved, and that is enough for him to shew. This matter might have been taken advantage of upon the trial.

Gould and *Powys* agreed, and judgment was given for the plaintiff.

Holt chief justice said, this was not like the case of *Jones vrs. Merley*, for this must relate to the day of the month; that being spoken of the term, which is an intire thing, could not be construed otherwise. And *Powell* agreed that it differed much.

Coggs *vers.* Bernard.

8. C. Com. 133. Salk. 26. 3 Salk. 11. Holt. 13. Entry. Salk. 735. post. Vol. 3. p. 163.

IN an action upon the case the plaintiff declared, *quod cum* Bernard the defendant, the tenth of November 13 Will. 3. at, &c. *assumpsisset, salvo et secure elevare, Anglice* to take up, several hogsheds of brandy then in a certain cellar in D. *et salvo et secure deponere, Anglice* to lay them down again, in a certain other cellar in Water lane, the said defendant and his servants and agents, *tam negligenter et improvide* put them down again into the said other cellar, *quod per defectum curæ ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, *viz.* so many gallons of brandy was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alledged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

If a man undertakes to carry goods (a) safely and securely, he is responsible for any damage they may sustain in the carriage thro' his neglect tho' he was not a common carrier and was to have nothing for the carriage. Vide 1 H. Bl. 158. & Jones on bailment.

Could justice. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage: and if a *præmium* be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without any thing to be had for his pains, an (b) action will not lie for non-performance, because it is *nudum pactum*. So is the 3 H. 6. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie: 29 Aff. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is *Doe & Stud.* 129. upon that difference. The same difference is where he comes to goods by finding. *Doe & Stud. ubi supra. Ovi.* 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is *Keilw.* 160. 2 H. 7. 11. 22 Aff. 41. 1 R. 10. *Bro. action sur le case.* 78. *Southcote's* case is a hard case indeed, to oblige all men, that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which

(b) Vide post. 919.

(a) Vide Jones, 63.

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is a thing no man living that is not a lawyer could think of: and indeed it appears by the report of that case in *Cro. El.* 815. that it was adjudged by two judges only, viz. *Gawdy* and *Clench*. But in 1 *Ventr.* 121. there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l.* the defendant shewed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

Pouys agreed upon the neglect.

Powell. The doubt is, because it is not mentioned in the declaration, that the defendant had any thing for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shewn? And I hold, an action will lie, as this case is. And in order to make it out I shall first shew, that there are great authorities for me, and none against me; and then secondly, I shall shew the reason and *gist* of this action: and then thirdly, I shall consider *Southcote's* case.

1. Those authorities in the *Register* 110. *a. b.* of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them, but that they are writs, which are framed short. But a writ upon the case must mention every thing that is material in the case, and nothing is to be added to it in the count, but the time, and such other circumstances. But even that objection is answered by *Rast. Entr.* 13. *c.* where there is a declaration so general. The year books are full in this point. 43 *Ed.* 3. 33. *a.* there is no particular act shewed. There indeed the weight is laid more upon the neglect, than the contract. But in 48 *Ed.* 3. 6. and 19 *H.* 6. 49. there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 *H.* 7. 11. 7 *H.* 4. 14. these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the *gist* of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is 1 *Jones* 179. *Palm.*

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Palm. 548. For the bailee is not bound, upon any undertaking against the act of God. Justice *Jones* in that case puts the case of the 22 *Aff.* where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, viz. the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An (a) action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the countess of *Salop.* An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration, the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the (b) action would have lain upon that special undertaking. But there the action was laid generally.

(a) Vide post
919. and the
books there
cited.

Warranty with-
out a consider-
ation is good.

(b) Vide Com.
627. Burr.
1638.

3. *Southcote's* (c) case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think, that a general bailment is an undertaking to keep the goods safely at all events. That is hard. *Coke* reports the case upon that reason, but makes a difference, where a man undertakes specially, to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon

(c) That notion in *Southcote's* case. 4 Rep. 83. b. that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione m^{ri} Busbury.* Note to 3d Ed.

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(*) Vide Jones
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consideration of the authorities there cited, I find no such difference. In 9 *Ed* 4. 40. *b.* there is such an opinion by *Danby*. The case in 3 *H.* 7. 4. was of a special bailment, so that that case cannot go very far in the matter. 6 *H.* 7. 12. there is such an opinion by the by. And this is all the foundation of *Southcote's* case. But there are cases there cited, which are stronger against it, as 10 *H.* 7. 26. 29 *Aff.* 28. the case of a pawn. My lord *Coke* would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bail'd to him to keep. 8 *Ed.* 2. *Fitzb. detinue* 59. the case of goods bail'd to a man, lock'd up in a chest, and stolen; and for the reason of that case, sure it would be hard, that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bail'd safely against all events. But if (a) a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt chief justice. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at *Guildhall*. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

(*) Vide Jones
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I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to shew the grounds, upon which a man shall be charged with goods put into his custody, I must shew the several sorts of bailments. And (b) there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor;

bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote's* case. The second sort is, when goods or chattels that are useful, are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in *Latin* *vadum*, and in *English* a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the (a) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But (b) my lord *Coke* has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them, that advance this doctrine, to shew an undisturbed rule and practice of the law according to this position. But to shew that the tenor of the law was always otherwise, I shall give a history

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Accommodatum.

Locatio.

Pawns.

Things to be carried, &c. for a reward.

To be carried without reward.

A man who receives goods to keep gratis for the use of the bailor is not answerable for their loss or for any damage they may sustain, unless he was guilty of some gross neglect with respect to them.
Vide Str. 1099.
Nor even then if he was guilty of the same neglect with respect to his own.
D. acc. ante 655.
Semb. acc. Burr. 2300. Vide Jones 46. 62.

(a) Vide Jones 36.

(b) Vide ante 655. Jones 41.

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of the authorities in the books in this matter, and by them shew, that there never was any such resolution given before *Southcote's* case. The 29 *Aff.* 28. is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 *Edw.* 2. *Fitz. detinuit*, 59. where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 *Edw.* 4. 40. b. was but a debate at bar. For *Danby* was but a counsel then, though he had been chief justice in the beginning of *Ed.* 4. yet he was removed, and restored again upon the restitution of *Hen.* 6. as appears by *Dugdale's Chronicle Series*. So that what he said cannot be taken to be any authority, for he spoke only for his client; and *Genney* for his client said the contrary. The case in 3 *Hen.* 7. 4. is but a sudden opinion and that but by half the court; and yet that is the only ground for this opinion of my lord *Coke*, which besides he has improved. But the practice has been always at *Guildhall*, to disallow that to be a sufficient evidence, to charge the bailee. And it was practised so before my time, all chief justice *Pemberton's* time, and ever since, against the opinion of that case. When I read *Southcote's* case heretofore, I was not so discerning as my brother *Powys* tell us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is *Bracton*, lib. 3. c. 2. 99. b. *J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidia vel negligentia, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ salutati hoc debet imputare.* As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by

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by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This *Bracton* I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in *Justinian's Inst. lib. 3. tit. 15.* There the law goes farther, for there it is said, *Ex eo solo tenetur, si quid dolo commiserit: culpe autem nomine, id est, desidie ac negligentie, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradidit non ei, sed suae facilitati id imputare debet.* So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, inexpress words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. *Hob. 34.* a covenant, that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrong doers. *3 Cro. 214. acc. 2 Cro. 425. acc.* upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong doers, when put in writing, it is hard it should do it more so, when spoken. *Doct. & Stud. 130.* is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's case*; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment; viz. *commodatum* or lending *gratis*, the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse, to go Westward, or for a month; if the bailee go Northward, or keep the horse above a month, if any accident happen to the horse in the Northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in *Bracton ubi supra*: his words are, *Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuum accepit,*

A gross neglect
an evidence of
fraud.

Tho' a man
who takes goods
to keep gratis
for the use of
the bailee ex-
pressly under-
takes to redeli-
ver them safely
he is not res-
ponsible for any
loss or damage
occasioned by a
wrong doer.
Sed vide Jones
45.

The borrower
of goods is re-
sponsible for any
damage or loss
if it was occasi-
oned by his ne-
glect. Vide
Jones 65, 72.
73.
or if he used the
goods in a man-
ner not war-
ranted by the
terms of the
loan. Vide
Jones 68, 69.

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Note in the Bracton before me, it is commodatam, but that must be a mistake, as you will find by Justinian, ubi supra, from whence Bracton has taken all his distinctions, and that almost word for word. The borrower of goods shall not be responsible for a loss by robbery, unless the robbery was occasioned or facilitated by some neglect on his part. Vide Jones 66.

The hirer of goods is responsible wherever the borrower would be, sed vide Jones 86. and not elsewhere.

(b) D. acc. post 1087.

(c) S. P. 3 Salk. 268. Holt, 528. Salk. 522.

accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incurfu, consumpta fuerit, vel deperdita, subtrahita vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incurfu hostium vel praedonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur. I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62. b. *Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dedit vel promiserit, talis ab eo desideratur custodia, qualem (a) diligentissimus paterfamilias suis rebus adhibet, quam si praestiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.* From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (b) bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, *viz. vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly for what neglects he shall make satisfaction. As to the first, he has a special property, for (c) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be

(c) Vide Jones 87.

such

such as it will be the worse for using, the (a) pawnee cannot use it, as cloaths, &c. but if it be such, as will be never the worse, as if jewels for the purpose were pawn'd to a lady, she (b) might use them. But then she must do it at her peril, for whereas, if she keeps them lock'd up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robb'd of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow. 123.* But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawn'd, to maintain it, as a horse, cow, &c. then (c) the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompense for the meat. As to the second point *Bracton 99. b.* gives you the answer. *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præsiterit, et rem casu amiserit, securus esse possit, nec impediatur creditum petere.* In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is *29 Aff. 28.* and *Southcote's case* is. But indeed the reason given in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of *Affixæ*, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawn'd, be tender'd to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him, is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

keeps goods by wrong is at all events answerable for their loss or damage. vide

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(a) S. P. 3 Salk. 268. Holt 528. Salk. 522.

If a pawnee use the pawn about the keeping of which he is at no charge, he is answerable at all events for any loss or damage which may happen with respect to it while he is using it. S. P. 3 Salk. 268. Holt 528. Salk. 522. vide Jones 801.

The pawnee of goods is responsible for any loss or damage with respect to the pawn while he is warranted in detaining it, if it was occasioned by his negligence. Vide Jones 75. otherwise he is not. S. P. 3 Salk. 268. Salk. 522. vide Jones 75.

But he is answerable at all events for any loss or damage which happens after he ought to have returned the pawn. S. P. 3 Salk. 268. Holt 528. Salk. 522. vide ante 753. Jones 79.

A man that Jones 70, 71.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a publick employment, or a delivery to a private

(b) S. P. 3 Salk. 268. Holt 528. Salk. 522. vide Jones 80, 81. (c) S. P. 3 Salk. 268. Holt 528. Salk. 522. vide Jones 80, 81.

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If goods are delivered to a person in a public employment for a purpose in respect of which he is to have a reward he is answerable for any loss or damage which is not occasioned by the act of God or the king's enemies. S. P. Holt 131. R. acc. 1 Will. 281. Barclay v. Yann. B. R. E. T. 24 G. 3. Trent and Mercery Company v. Wood. B. R. E. T. 25 G. 3. 1 T. R. 27. vide ante 264. Str. 128. Burr. 2300, 2827. Jones 103. A bailiff or factor, tho' he is to have a reward is not answerable for any loss or damage which was not occasioned or facilitated by his neglect. S. P. Holt 131. Vide 1 Vent. 121. 2 Lev. 5.

A man to whom goods are delivered for a purpose in respect of which he is to have no reward is not answerable for any loss or damage occasioned by a third person.

Case lies for negligently executing a *gratia* commission. vide 1 H. Bl. 258.

person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. which case of a master of a ship was first adjudged 26 Car. 2. in the case of *Mors v. Slew*. Raym. 220. 1 Vent. 190. 238. The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c. and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robb'd, &c. it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it lock'd up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestick servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In *Bracton lib. 3. 100.* it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in *English* an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. *Vinnius*

nus in his commentaries upon *Justinian*, lib. 3. tit. 27. 684. defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. *Bracton ubi supra* says, *contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis*. I don't find this word in any other author of our law, besides in this place in *Bracton*, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

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The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 *Roll. Abr.* 10. 2 *Hen.* 7. 11. a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drown'd by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

A breach of a trust undertaken voluntarily is a good ground for an action. Vide Jones 56, 57.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the (a) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 *Hen.* 6. 49. and the other cases cited by my brothers, shew that this is the difference. But in the 11 *Hen.* 4. 33. this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the

(a) Vide Jones 56. 57. 61.

court,

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If a man promises to redeliver goods in consideration of having them delivered to him, an action will lie against him for not re-delivering them. Vide Jones 50, 51.

court, what if he had built the house upskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A. and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in *Yelv. 4.* judgment was given that the action would lie. But that judgment was afterwards revers'd, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. *Yelv. 128.* But those cases were grumbled at, and the reversal of that judgment in *Yelv. 4.* was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 *Cro. 667. Tr. 21 Jac. 1.* in the king's bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors v. Slew* was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

Regina vers. Goddard and Carlton.

3 S. C. Salk. 171.

Is an indictment matter of inducement may be stated by way of recital.

Vide post 1363.

In an indictment for forging an assignment of a lease, the lease is matter

of inducement only. Vide post 1363. *Qs.* Whether upon such an indictment an allegation that it is witnessed by a certain indenture that the lessor had demised, and by the said indenture did demise, it is a sufficient allegation that there was a lease. Unless such assignment was by deed, the indictment must shew that it was signed. If a party is found guilty of a misdemeanor upon one indictment, and then a second is preferred against him for the same offence under the idea that the former was defective, the court will not as of course enter judgment for him upon that before they make him plead to the other. 'Tis no plea in abatement to an indictment for a misdemeanor, that there is another indictment depending against the defendant for the same offence.

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v.
GODDARD.

The first exception was, that the indictment was laid with a *Quod cum*, which was ill. But the court held that was well enough, being but inducement. And *Holt* chief justice said, this differeth from a declaration in trespass, because in that case, there is nothing of recital in the declaration, as there is here, and when the indictment comes to charge the forgery, it does charge it positively.

The second exception was, that it was not said that there was a demise, and if there was no demise, there could be no assignment, but only that by a certain indenture *testatum existit* that J. S. demised. And as to this exception the court were divided. *Holt* chief justice and *Powys* held, that the *et per eandem indenturam concessit et dimisit*, was a positive distinct averment of a lease, and had no relation to the *testatum existit*. *Powell* and *Gould* on the contrary, that that, as well as the *dimisisset*, must refer to the *testatum existit*. And *Powell* said, they could not take this to be a distinct averment, because they must take it to be the recital of the lease, the constant form of deeds being to put both in, *viz.* hath demised and doth demise. *Holt* said, it was well to declare in covenant with a *quod cum testatum existit*, nay even when you come to set out the covenant, you may say, *testatum existit quod convenit*. But *Powell* said, that would not rule this case, for that, it may be, might be ruled upon precedents, which often rule cases.

The third exception was, that there was no mark upon the *posse*. And now since the statute of frauds 29 Car. 2. c. 3. a lease is not assignable without writing signed by the party. And this was agreed to be a good exception by the whole court. But *Holt* chief justice said, if the indictment had been, that the defendant had forged a deed of assignment, and then they had set it out thus, without any mark, that (a) had been well enough, because signing is not necessary to a deed, and deeds antiently were not signed. But now since the statute of frauds, an assignment by writing, if it be not a deed, must be signed, and therefore this not appearing to be any more, this ought to have been shewed to be signed, or else it is no assignment.

Deeds need not
be signed.
Vide 29 Car. 2.
c. 3. s. 1.
Com. 306.

Powell justice said, that in the case of the *King v. Newton* in *Charles the Second's* time, 3 Keb. 356. 367. because an indictment of forging said only *scriptum*, and did not say *sigillatum*, the judgment was reversed upon a writ of error out of *Chester*.

This matter was stirred in *Easter* term, and now the first day of this term, Mr. serjeant *Darnall* shewed the court, that the indictment upon the file was right. And *Holt* said, that he doubted then here had been no trial at all, this being a material variance. But there having been a new in-

(a) S. P. Salk. 342.

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dictment found, pending this matter, the court would not determine these exceptions, but made him plead to that, where these things were amended; but they seemed *in omnibus* to retain their former opinions.

Then the counsel for the defendants moved, that before the court would make them plead to the new indictment, they would enter judgment for the defendants upon this. But the court said, they would make no bargains with them.

No pleading
over but in
treason or felony.

Holt chief justice said, a man could not plead over in any case, but in treason or felony, and not in case of a misdemeanor; and that a man, after he has been found guilty, can't plead that indictment depending in abatement, but must plead *auterfois convict*. And the defendants pleaded to the new indictment.

Regina *vers.* Scott.

R. Acc. 2 T.
R. 513. Semb.
acc. ante 792.
304.

THE defendant was indicted for not repairing the pavement before his house in *Old-street*, *ad commune nocumentum*, &c. And on Mr. Ward's motion it was quashed, because it was not said, how he was obliged to repair it, and this was not within the late act of parliament for paving the streets. 22 & 33 Car. 2. c. 17.

Intr. Mich. 13.
370. B. R.

A repleader
cannot be a-
warded in
personal actions
after the de-
fendant has
made default at
nisi prius. S. C.
Salk. 216. 579.
3 Salk. 121.
6 Mod. 1.

If a man justifies
trespasses by
stating that Y. S.
was possessed of
a wharf for
divers years, and
during his pos-
session had a

Staples *vers.* Heydon.

IN trespass for breaking his wharf, and cutting down his fences, the plaintiff declares against two defendants, for two trespasses done at two several times. One defendant pleads not guilty as to the whole. The other defendant as to the first, pleads this special justification, that one Gray was possessed of this wharf and a timber-yard next adjoining for ninety years; and while he was so possessed, had and used a way from this timber-yard over this wharf to the *Thames*, and being so possessed did demise the timber-yard to Heydon for a lesser term; and that the plaintiff erected this fence, and stopped up his way, and the defendant cut it down. And in the lease there was a grant of all ways and passages, &c.

way from thence over the locus in quo, that he underlet to the defendant, and granted to him all ways, &c. and that the defendant had no other way to the terminus ad quem, the allegation that the defendant had no other way to the terminus ad quem is surplusage. S. C. 6 Mod. 1. And an issue taken therein is immaterial. Such a justification ought to shew the commencement of Y. S. term. S. C. 6 Mod. 1. vide ante 331. and the books there cited. In case of a confession and avoidance tho' the matter of avoidance is ill pleaded, the plaintiff shall not take judgment upon the confession if it could have been well pleaded. S. C. Salk. 173. 3 Salk. 121. 6 Mod. 1. vide ante 90, and the books there cited, where there is an immaterial issue, and the defendant makes default at *nisi prius*, and the jury find the issue for him, there can be no judgment for him, but the suit shall in general abate. vide post 926. In trespass against two defendants for two trespasses, if the one pleads not guilty and is found guilty as to one of the trespasses and not guilty as to the other, and the other justifies both distinctly, and has a demurrer to one plea to that which applies to the trespass upon which the other defendant was found not guilty, and an immaterial issue, makes default at *nisi prius*, and yet has a verdict on the issue, Qu. What judgment can be entered upon the record. vide post 926.

and

and avers, that he had no other way to the river *Thames*. And to this plea there was a demurrer. And to the other trespass he pleaded the same justification; and the plaintiff replied, that he had another way; and issue was taken upon that. And at *nisi prius* the defendant made default, and the inquest was taken by default, and there was a verdict for the defendant, and 6*d.* conditional damages upon the demurrer, and the other defendant was found guilty of the first trespass and not guilty of the second.

And first it was moved, that there might be a replender in this case, the issue being wholly immaterial; for it was not material, whether he had any other way to the *Thames* or not. Indeed if he had averred, he had no other way at all to his timber-yard, but over the wharf, that might have been material, for then it might have passed of necessity.

But the court held, that they could not award a replender in this case, because the defendant by his default at the trial was out of court, and consequently there could be no repleading.

But *Holt* chief justice said, that if the defendant had made out a good title to the way in his plea, and then had made this impertinent averment, and the plaintiff had replied and taken issue upon it; there had needed no replender, but it had been aided by the statute of *jeofails* by the verdict. Which *Powell* denied, and said that it would not have been aided, but there must have been a replender in case there had been no default; and he held, that it was necessary to shew a title to the way in this case. And he took a difference between an action upon the case for stopping a way; there the action being against a wrong doer, it is enough to shew a possession: otherwise where a man will justify a trespass by it.

And they all held, that both the justifications were naught: and *Holt* said, that it was ill, to plead the term for years, without shewing the commencement of it; and that it was a kind of prescription which could not be in tenants for years. But he said, if they had pleaded, that such an one was seised in fee of both, that there was a way always used, &c. and that he demised to *Gray*, and *Gray* to the defendant *prout*, &c. that had been a good title, for then it passed by the demise of *Gray* as appurtenant. So if he had said, that such a one was seised in fee of both, and demised to *Gray*, and *Gray* made the way, and then demised; for then it had passed also as appurtenant. And *Powell* said, it might have been pleaded by way of grant from the termor. Then Mr. *Wild* said, that the defendant having by

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h is plea confessed the trespass, and said nothing to justify it the plaintiff ought to have his judgment, however the issue was. And for that he cited 3 Cro. 214. an action for saying, he is as very a thief as any in *Warwick* gaol. The defendant pleaded, that he comforted a felon, and so he spoke the words, and issue upon that. And though the issue was agreed to be immaterial, inasmuch as that matter would not make him a thief, but only a felon; yet in regard he had confessed the speaking of the words, judgment was given against him upon his own confession, without regard to the issue. And 1 Leon. 68. debt against the defendant, as executor of an executor: the defendant pleads *plene administravit* the goods of his testator, and issue upon that; and though that was held to be immaterial, yet the court gave judgment for the plaintiff by *nihil dicit*, because he had not answered the charge, which was as executor of an executor.

But *Holt* chief justice took this difference: That where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there in such a case judgment shall be given upon the confession, without regard to such an immaterial issue. And so is the case in 3 Cro. 214. for there the matter of the justification could never be made good by any sort of plea. For his being an accessory to a felony would never justify the defendant in calling him thief. But where the matter of the justification is such a matter, as if it were well pleaded, would be a good justification, there though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action, as in this case here of the way. The case in *Leon*. is not law. For the saying he had fully administered the goods of his testator, does not confess *assets* of his testator's testator. (Note, when *Leon* was cited, the judges seemed to slight it,) and the books do all of them, if they be narrowly looked into, turn upon this difference; where the confession is full, and the matter of the plea is ill in substance.

Powell. This is no confession. The old books take a difference between an express confession, and a *nient dedire*. And though the way be ill pleaded, you cannot call that an express confession.

Holt. It is contrary to the tenor of all the books. And as to the matter of the repleader, *Holt* said upon a former argument, that the defendant being out of court by his default, it was impossible to award a repleader. For upon a repleader both the parties must replead, which the defendant can never do, being out of court. And there is no way to bring the defendant into court again, neither can the plaintiff wave the default, as he may in a real action. In a real action, if the tenant makes default upon the day of the

the return of the original, a *grand cape* is awarded, and upon the return of it, if the demandant insists upon the default, he shall have judgment final. But the demandant may wave the default, and take an appearance upon the *grand cape*. And that is regular, because there the defendant comes in by process. So if the tenant make default at *nisi prius*, the default is recorded, and a *petit cape* is awarded, and upon the return of that, the tenant may save his default. But when the defendant makes default in a personal action, the default can never be waved, for there is no process to bring him into court again: and besides, the day of *nisi prius* and the day in bank is all one day, and therefore a default at *nisi prius* cannot be waved at the day in bank.

At the stirring this case again Holt chief justice said, that some old books held, that where the defendant made default after issue joined, judgment should be given by default, and not the inquest taken by default. Some old books indeed are so, but I never understood the reason of them. A difference has been taken indeed, where a release was pleaded, and where other matter; in the first case, because that plea confesses the debt, if the defendant made default at the trial, judgment shall be given against him by default; but even in that case they agree, the plaintiff may go on to trial; if he will. As to all other cases, it is a general rule, that there shall be no judgment by default after issue joined. By the statutes of *Westm. 2.* and *Marlb.* the defendant can have but one default after issue joined, and that must be *ad proximum diem*. Now you always appear upon the return of the *venire facias*. But in those days the defendant was called solemnly upon the return of the *venire facias*; and if he made default, then went out a *distingas*, in which was inserted a clause to distrain the defendant to appear; but if he made default, then there was no other process to bring him into court again, and so his default was peremptory. You have got a trick of making default, but let me warn you never to make defaults any more; for it will be hard to maintain that any judgment can be given for the defendant, after he has made default. Powell justice said, that a defendant, after he has made default, is not so out of court, but that judgment may be given against him, but he can never have a day in court again. And the court ordered the counsel for the plaintiff to consider, whether judgment might not be given against the defendant in this upon his default. And adjourned.

When the case was stirred again, and this matter of the confession mentioned again, the court over ruled it again upon the same distinctions. See 20 *Hen. 6.* 31, 32. 22 *Hen. 6.* 58.

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Holt chief justice took notice of the statute of *Marlb. c. 13.* and *Westm. 2. c. 27.* and as I took it said, that by those statutes the defendant could have but one essoin or one default after issue joined, and that upon the *venire facias*; so that if he made default upon the *distingas*, he was quite out of court, and the jury should be taken by default: but that before issue joined, the first default was peremptory, and judgment should be given against the defendant by default.

Powell said, that there was a difference between real and personal actions; that in personal actions the inquest should be taken by default otherwise in real actions.

And the court were of opinion, that seeing the parties could not be let in again to plead, to abate the writ. But then Mr. *Wald* moved for judgment upon the demurrer, because the plea was naught. And the court were in doubt how to give judgment as this case stood, there being some difference about the stating the case. But *Powell* justice was of opinion, that as this case is put, the writ might be abated for the last trespass, and judgment given for the plaintiff for the first. But the case was adjourned.

Upon the stirring this case again, the case appeared to be contrary, and the defendant, that pleaded not guilty generally, was found guilty (a) of the first, and not guilty of the second; and so the difficulty was, how they should give judgment? for they agreed that they could not give judgment for part only, but they must give judgment upon the whole record for the whole, as to both the defendants: and also, that upon the immaterial issue, the judgment must be, that the bill be abated, and that a bill might be abated as to part of the trespass, and stand good for the rest; but they never knew it abated as to one defendant, and stand good against the other. And it was adjourned (b.)

(a) Q. whether this should not be "not guilty of the first, and guilty of the second" otherwise the case does not appear contrary to what it was before stated to be, and it should seem there would be no difficulty as to the judgment.

(b) According to the report in 6 Mod. 7. the court afterwards held the issue upon the 2d special plea cured by the statutes of jeofails, and gave judgment thereon for the defendant, and on the demurrer for the plaintiff.

Regina vers. Crofts.

It ought to appear upon the face of an inquisition of forcible detainer that the jury who took it were of the neighbourhood of the place where the detainer was. Vide 3 H. 6. c. 9. or at least of the county.

AN inquisition of forcible detainer of a copyhold messuage in *Streatham*, of which *Henry Hampson* was seised in fee according to the custom, &c. was found against the defendant the eleventh of *December 1702.* before Mr. *Lade* and Mr. *Hartley*, two justices of the peace in *Surrey*; and being removed into the king's bench by *certiorari*, after several motions it was quashed, because it did not appear that the jury before whom the inquisition was taken were of the neighbourhood, nor of

And probi and legales homines. Vide post 1305. Sed vide ante 388.

the

the county, it being only said, *inquisitio, &c. capta per sacramentum Georgii Franklyn, &c. coram* the two justices, and did not say of what place the jury were, nor *proborum et legalium hominum comitatus prædicti*. See *Lamb. Just.* 163. *Keb.* 286. *Raymond* counsel against the defendant.

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v.
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Regina *vers.* Robert Mead an attorney.

THE defendant and eight others were incorporated under an act made in the 39 *El.* by the name of the surveyors of the highways at *Aylesbury* in the county of *Burks*, and were trustees of a charity called *Bedford's* gift. An information was preferred against the defendant, for executing this office, being an office of trust, without having taken the oaths, contrary to 25 *Car.* 2. c. 2. To which he pleaded not guilty. And now Mr. *Raymond* moved for a rule, that the prosecutor might have two books produced, which these surveyors kept, in which they entered their elections, and also their receipts and disbursements; and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial. But *per curiam* denied, because they are perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution.

A man shall not be compelled to produce or give a copy of books of a private nature. *R. acc.* *Str.* 717. *D. acc.* *Str.* 308. Particularly if the object is to obtain evidence in support of a criminal prosecution against him. *R. acc.* *Str.* 1210. *Blackst.* 37. *1 Wils.* 239. & vide *Bl.* 351. The books of the elections, receipts and disbursements of a charity, are of a

persons incorporated by a private act for repairing highways, and taking care of a private nature.

Westbrooke et alii *vers.* Andrews.

ERROR on a judgment given against the defendant in the common pleas, in an action of trespass for breaking the plaintiff's close, &c. after several pleadings. And now the error assign'd was, that there was no *capiatur* entered. But *per curiam*, since the late statute 5 *W. & M.* c. 12. which takes the away the process for the *capiatur pro fine*, there need be none entered. And judgment was affirmed.

Intr. Mich. 1 *Ann. B. R. Rot.* 456. 'Tis not necessary to enter a *capiatur* upon a judgment for the plaintiff in an action of trespass.

Daniel *vers.* Morewood.

THE defendant being in the *Marshalsea* prison of this court, upon *mesne* process at the plaintiff's suit for debt, escaped. Whereupon the plaintiff upon an *affidavit* of the escape procured an escape warrant from Mr. Justice *Gould*; by virtue whereof the defendant was taken up in *St. Clement's* parish, and carried to *Newgate*. The defendant moved by his counsel that he might be set at liberty,

'Tis an escape for a prisoner in the king's bench prison to be at large before the usual day rule is made, tho' his name is comprised in the common petition, and afterwards inserted in the rule. because

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because he insisted upon it, he was abroad by virtue of a day rule, when he was taken by the escape warrant, it being term time; and upon examination, and *affidavit*, the fact appeared to be, that he was taken up upon the escape warrant before the queen's bench sat that morning and that after the queen's bench sat, he was in the petition among the other prisoners; and a day rule as usual was made, in which he was. And though there are to be no fractions in a day, yet the court held, that they ought not to set him at liberty, it appearing to them, that when he was arrested, he had not any day rule.

Ward *vers.* Evans.

Intr. Pasch. 13
W. 3. B. R. Rot.
206.

S. C. Com. 138. 6 Mod. 36. with some difference. Salk. 442. Molt. 120.

If a creditor desires his debtor to pay part of the debt to a third person to whom the creditor is indebted, and indorse it on a note from him to his creditor, if the debtor makes the indorsement, but omits to pay the money, the third person may recover it from him by an action for money had and received.

If a servant who is sent to receive money accepts a goldsmith's note instead of it, such acceptance does not bind his master. S. C. 3 Salk. 118. vide 10 Mod. 109. 11 Mod. 71. 87. Unless he acquiesces in it. vide 11 Mod. 72. 88. or omits sending the note back within a reasonable time. Vide 11 Mod. 72. 88. If such a note is given at noon, it is sufficiently early to send it back the next morning. If a goldsmith's note payable on demand in the place in which it is paid away, is paid away about noon, it is sufficiently early to present it for payment the next morning. Vide Bayley. 33.

AN action upon the case upon an *indebitatus assumpsit* was brought, wherein the plaintiff counts on three promises, viz. for 60*l.* received by the defendant to the plaintiff's use, for 60*l.* lent by the plaintiff to the defendant, and on an *insimul computasset* for 60*l.* On *non assumpsit* pleaded, the cause was tried at the *nisi prius* at London, before the lord chief justice Holt. And on the evidence the fact appeared to be; one *Fellows* a merchant, who kept his cash with the defendant Sir *Stephen Evans*, a goldsmith in *Lombard Street*, was indebted to the plaintiff in 60*l.* 10*s.* the plaintiff sent his servant to receive the money of *Fellows*, who ordered his servant to pay *Ward's* man the money at Sir *Stephen Evans's*. Accordingly both the servants went to Sir *Stephen Evans's* shop, and there *Fellows's* servant directed the defendant's servant to pay *Ward's* servant the 60*l.* 10*s.* and to indorse it on a note of 100*l.* from the defendant to *Fellows*, in part of payment of the 100*l.* The defendant's servant accordingly indorses 60*l.* 10*s.* as paid on the said note of 100*l.* and then paid 10*s.* to *Ward's* servant, and gave him a note subscribed by one *Wallis* a goldsmith, for 60*l.* payable to one *Freeman* or bearer, which the plaintiff's servant accepted. This transaction was about noon, and at that time *Wallis* was a solvent person, and continued paying his bills till night. Next morning the plaintiff's servant coming with the note to receive the 60*l.* of *Wallis*, found that *Wallis* had stopped payment, and was become insolvent. Whereupon the plaintiff brings this action against the defendant for the 60*l.* Note, it did not appear upon the evidence, that the plaintiff was confusant of, or privy to, this transaction of his servant, or had given him any authority to receive a note instead of money, or approved of it afterwards. This matter at the request of the

defendant's

defendant's counsel was drawn up by way of case, and was put in the paper to be argued.

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Three points were made in this case. First, whether this evidence was sufficient to maintain the declaration on any of the three counts. Secondly, whether the acceptance of the note upon *Wallis* by the plaintiff's servant without his direction or approbation shall bind the plaintiff. Thirdly, whether the delivery of such a note be in law a good and actual payment of the 60*l*.

Mr. serjeant *Hall* was of counsel for the defendant, and gave his opinion for his client, but did not think it necessary to labour the points,

Mr. serjeant *Darnall* for the plaintiff argued, that the servants of merchants might in some cases bind their masters by their acts, but then it must be in the business of a merchant; but a servant can't accept a bill of exchange drawn upon his master, to bind his master, unless there be plain and strong evidence, that the master gave him authority so to do. And he cited *Lex Mercatoria*, 265. and a treatise concerning bills of exchange by *John Marius*, 47. A *fortiori* the servant in this case can't bind the plaintiff without his consent, where there is not the same necessity, nor the same advantage to the public by encouraging of trade. 2. This is no actual payment, for the law adjudges nothing actual payment, but money, or other thing given or taken in satisfaction by consent of both parties. 5 Co. 117. *Pynnel's case*. This note is but a bare piece of paper, not valuable in itself, nor valuable to the plaintiff, for he can't bring any action to compel the payment of it, but in the name of (a) *Freeman*, who may refuse to give him leave to use his name. He agreed, that if *A.* sells goods to *B.* for 50*l*. and at the same time *B.* gives *A.* such a note for 50*l*. and *A.* accepts it; this (b) is an actual payment, although the note be never received; because it shall be taken as part of the contract, that *A.* was to accept such note in satisfaction for his goods. But where there is a preceding debt or duty, as in this case, such (c) note will not amount to payment, till it be paid, unless (d) there be any negligence and delay in the party who takes the note, in going to receive it. For if the goldsmith continues solvent for a long time after the note delivered, and the party keep the note by him without demanding the money, and afterwards the goldsmith become insolvent; he that took the note shall stand to the loss of it, because by keeping the note he prevented the other from receiving it. But in this case the fact is otherwise, for the plaintiff's servant went the next morning to receive the money.

Note, *Holt* chief justice said *Marius's* book was a very good book.

(a) See *vide* 1 Show. 235, 2 Show. 160. Burr. 1516. BL. 485.

(b) *Vide post* 930. Bayley 12, 17, 42, 48.

(c) *Vide post* 930. Bayley, 12, 17, 42, 48. (d) *Vide Prec.* Chan. 200. 2 Will. 353.

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Holt chief justice. When a servant is sent to receive money on a bill, he can't accept a note instead of money, without the particular directions of his master. Suppose the servant in this case had brought *Wallis's* note home to the plaintiff, and the plaintiff had sent him back with it, refusing to accept it, and insisting to have money, then it would not have been a payment beyond all doubt. But indeed if the master does give his consent subsequent to the taking of the note, that will amount to an authority precedent. But then I am of opinion, and always was (notwithstanding the noise and cry, that it is the use of *Lombard-street*, as if the contrary opinion would blow up *Lombard-street*) that the acceptance of such a note is not actual payment. I agree the difference taken by my brother *Darnall*, that taking a note for goods sold is a payment, because it was part of the original contract; but paper is no payment where there is a precedent debt. For when such a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time. This note was demanded within convenient time, but if the party who takes the note, keep it by him for several days, without demanding it, and the person who ought to pay it becomes insolvent, he that received it must bear the loss; because he prevented the other person from receiving the money, by detaining the note in his custody. As for the nature of the action, I am of opinion, that an *indebitatus assumpsit* for monies received to the plaintiff's use lies properly in this case, and that this evidence is sufficient to maintain the plaintiff's declaration. For when the 60*l.* was indors'd on *Fellows's* bill, as so much actually paid by Sir *Stephen Evans* to *Fellows*, *Fellows* directing that sum to be paid to the plaintiff, and the defendant having the money in his hands, it amounts to a receipt of so much by the defendant to the plaintiff's use. No doubt the action were maintainable, if the plaintiff had brought the note back again to the defendant, and though he did not, since it does not amount to actual payment, the plaintiff must recover.

Powell justice. This evidence will maintain the declaration, for *Fellows's* cash remaining in the defendant's hands, when by the indorsement the defendant is discharged from so much of *Fellows's* note as against him, that money being to be paid by his direction to the plaintiff, it is a receipt by the defendant to the plaintiff's use. The delivery and acceptance of *Wallis's* note is no payment, for when a master sends his servant to receive money, he cannot accept a note in lieu of it. Perhaps if the master had been there himself he would have refused the note, as knowing the insufficiency of *Wallis*; and shall the servant oblige him to take such a note by his acceptance, without his master's directions? indeed if the master consents to it afterwards, that amounts

to

to a previous command. Then the taking of such a note is no payment; for it is always a conditional acceptance, and so understood, not to be a discharge till paid; and if it should be otherwise, it would be to let in fraud; and give goldsmiths and others an opportunity of cheating traders. But still the money ought to be demanded in convenient time, for if the party keep the note by him without demanding it, he must run the hazard of it, but here it was demanded in due time.

Let the plaintiff take his judgment, *per totam curiam*.

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Tranter *vers.* Watſon.

S. C. 6 Mod. 11. Salk. 35.

WATSON was master of a merchant ſhip, which was taken at ſea by a *French* privateer. *Watſon* agreed with the captain of the privateer for the ranſom of the ſhip and goods at 1200*l.* and as a pledge or ſecurity for the payment of the money, *Watſon* was detained and carried into *France*; but the ſhip and goods were releaſed, and were brought into *Brifſol*, where the ſhip was unladed, and the goods landed (after cuſtom paid) and delivered to one *Day*; but whether in truſt for the benefit of the maſter, or for the uſe of the owners, was not agreed. *Watſon* commences his ſuit in the court of admiralty againſt the owners, to compel them to pay the 1200*l.* and redeem him; and thereupon a warrant was iſſued out of that court to arreſt the ſhip and goods in *quadam cauſa ſalvagii*, in order to compel the defendant to appear there, and the ſhip and goods were ſeized thereon. Mr. *Broderick* and Mr. *Dee* prayed a prohibition as to the goods, ſuggeſting the ſeizure on land *infra corpus comitatus*, and ſo not within their juriſdiction. He inſiſted, that the maſter has no power to make ſuch an agreement, nor to ſubject the goods to the payment of his ranſom, without the expreſs authority and conſent of the owners. The power of hypothecation in a voyage for neceſſaries, is incident to his office, and allowed for the neceſſity of the thing, and the benefit of the owners; but this is not ſo, for this is a redemption, and a new buying of the ſhip; and if this be allowed lawful, it will give a power to the maſter, to do an injury to the owners, by obliging them to the performance of an agreement of his making, upon any terms never ſo unreaſonable, and to compel them to pay more than the ſhip and goods are worth, as the agreement in this caſe is. Beſides the power of the maſter is only over the ſhip, and he has no power over the goods and lading, to make any diſpoſition thereof. Admitting the maſter has ſuch power, to ſubject the goods to the payment of this ranſom, yet he ought not to bring the ſuit in his own name, but the ſuit ought to be carried on in the name of the vendee or purchaſer of the goods. Admitting

A prohibition ſhall not be granted on the merits until the defendant below has appeared, and the plaintiff has exhibited his libel. Vide ante 346.

Nor ſhall it be granted until that time on account of the illegality of the proceſs if the proceſs would in any caſe within the juriſdiction of the court.

And *Q.* whether it ſhall ever be granted on account of the illegality of the proceſs.

Q. If the maſter of a captured veſſel ransoms it, whether he may not in general libel in the admiralty againſt the ſhip and cargo for the ranſom money. Vide ante 22. but ſee alſo 22 G. 3. c. 25.

But *Q.* whether he can libel againſt the cargo after delivering up to the owner.

ting the suit proper, yet the seizure is illegal, for the court of admiralty cannot award such process, as their first process to compel the party to appear, in the nature of an execution against the goods. And they can no more begin with such process than an inferior court; and as a prohibition shall be awarded to an inferior court in such cases, so ought it in this, though the party have not yet appeared, nor any libel be as yet exhibited. And so was it done in the case of Captain Sands and Sir Josiah Child, 5 Will. & Mar. Salk. 34. a prohibition was there granted on the warrant, before any libel.

On the other side it was insisted by Mr. Eyre and Mr. Mountague, that no prohibition ought to go in this case; for that the master has power, in this case, to subject the goods to the payment of his redemption; and it is founded on the same reason as his power of hypothecation, the necessity of the thing, and the benefit of the owners, by parting with some part of the goods to save the rest, whereas otherwise the whole would have been lost. So is *Molloy* 213, 214. *Hob.* 11, 12. [Note, *Holt* chief justice, upon his citing *Molloy*, said, cite the authorities there mentioned if you will, but do not cite the book itself.] But this being a matter and a cause properly within the jurisdiction of the court of admiralty, shall be determined there. And in a maritime cause, whereof they have consuance, the process of the court may be executed upon land, *infra corpus comitatus*. Besides the sale or delivery of the goods, upon land, will not take away the jurisdiction of that court, since they have jurisdiction of the original matter. And so it is adjudged, 1 *Sid.* 320. *Thompson v. Smith.* 3 *Cro.* 685. 2 *Saund.* 259. *Radley v. Eggesfield.* 1 *Lev.* 243. *Turner v. Neale.* As to the objection, that the suit in *curia admiraltatis* ought not to be in the master's name, they answered, that it is most proper in his name; for the captors, to whom the ransom belongs, and who have the master in their custody, cannot sue in their own names, because they are enemies; but if the suit be not carried on between proper parties, it is good cause for an appeal, and shall be determined by the rules of the marine law, but it is no ground for a prohibition. But admitting the merits of the cause to be against the master, yet the owners came too soon for a prohibition before they have appeared, and before any libel exhibited, so that it cannot appear to this court, what the nature of the suit is.

The court desired to hear a civilian, before they made any rule in this case, and accordingly doctor *Lane* attended for the plaintiff in *curia admiraltatis*. He argued, that salvage, or *causa salvagii*, as it is mentioned in the warrant, is of admiral jurisdiction: that the master represents both the owners of the ship, and the traders, and has a trust reposed in him, which extends to the goods

Salvage of admiralty jurisdiction.

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as well as the ship; the master may detain the goods of the merchant for the freight of the ship, or wages of mariners. The master in this case, by the marine law, has an hypothecation of the goods to him, to keep till payment be made of the money agreed, and not only a bare possession, and therefore though he depart with the possession of the goods before payment, that does not divest his interest. The goods were in the power and possession of the enemy, who might have kept or destroyed them all, if they had not been redeemed by the master, which is for the benefit of the owners. Redemption is a redemption by the master, and gives security for the payment of the money agreed, by subjecting his person as a pawn or pledge, so that he has as it were paid for the goods. This power of redemption is not founded on the *Rhodian* laws, or the laws of *Oleron*, but arises from the custom and law of nations, and the same custom or law gives the master in this case an interest in the ship and goods.

Here *Holt* chief justice interrupted him, and said, we are not now upon the merits of the cause, for that is not before us upon this motion.

It was agreed by the whole court, that no prohibition should be granted in this case.

Holt chief justice said, you come too soon for a prohibition, before appearance, and a libel filed, for you are not yet in court. If this process be an illegal process, and not justifiable by the rules of their law, you may take your remedy by an action of trespass or replevin. The case of *Sands* and Sir *Josiah Child*, was an action upon the statute of *Rich. 2.* and not on a prohibition as was suggested. We cannot try the legality of the process upon a motion. If it come before us on an action of trespass, we shall then judge both of the legality of the process and the power of the master. If a replevin or an action of trespass be brought, and there be a jurisdiction, we must determine, whether what was done was legally done or no, upon whatsoever law it is grounded, whether ecclesiastical, maritime, the law of nations, or whether [*H. J.*]. It seems very just and reasonable in this case, that the owners of the goods ought to pay the redemption. If a pirate should take the ship and goods, and the master redeem them, the owners shall make him satisfaction, and then much more in this case, when taken by an enemy. When the master makes a composition for the benefit of the owners, it is highly reasonable that he should be indemnified. The whole ship and goods would have been prize, if he had not made this composition; therefore where there is an instant danger of losing ship and goods (as in this case, when they were under the capture and power of the enemy) and no hopes of saving

If a pirate takes the ship and goods, and the master redeem them, the owners shall make satisfaction.

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saving them then appears (though afterwards it may happen that the ship may be rescued on fresh pursuit), cannot the master make such an agreement as this, as well as he may throw part of the goods overboard in case of a tempest, to save the rest? The master has the custody and care of the ship and goods. Supposing then that the master has such a power of compounding, the goods then remain to him as a security to him, and he may detain them till payment, as he may for freight. But then it is to be considered, whether, when he has once delivered them to the owner, or to his use, he has not departed with his security, and has no way to come at them again, as it is in case of freight? These things are considerable, if we go into the merits of the cause, but that not being before us, I give no opinion therein.

Powell justice. This process being only to compel the parties to appear, you come too soon for a prohibition before libel. We cannot determine the legality of the process in this manner. If that court has a power in any case to proceed against the goods, and to seize them on process, we ought not to grant a prohibition; for how does it appear to us, but that this process is awarded in such a case, wherein it lawfully may? As to the merits, it seems very reasonable, that the master should have power to make such a redemption, as he may throw part overboard in a tempest, to save the rest. And here the goods seem to remain in the nature of a pawn to the master, to secure the payment; and if the master by delivering out the goods has lost his interest therein, and so the seizure illegal, yet we cannot determine that on the return of the process before libel: you may plead that matter there, but we cannot take notice, that the process is illegal; if it be, you have your remedy.

Could agreed. *Powys* absent.

Ewer *vers.* *Jones*.

S. B. but rather differently reported, 6 Mod. 25. Com. 137. 3 Salk. 227.

Q. Whether the statute of the 21 Jac. 1. c. 16. of limitations extends to suits in the admiralty for seamen's wages. Vide post 1204. 4 Ann c. 16. s. 17, 18. If it does, the defendant must state directly that the cause of suit did not accrue within six years, a plea, that it appears by the libel that it did not accrue within six years is bad. Vide ante 533. post 1204. A prohibition shall not be granted to an inferior court for over-ruling a plea which is in itself bad, tho' it was over-ruled on improper grounds.

MR. *Doe* moved for a prohibition to the court of admiralty. The case was, *Jones* and other seamen libelled there against the owners for their wages, who pleaded the statute of limitations, but the judge over-ruled the plea, and gave sentence for the mariners to recover, and thereupon the owners appealed, and pending the appeal they came for a prohibition. Mr. *Doe* urged, that the statute extends to that court in this case, because the suit here is against the person immediately for recovery of the debt, and the proceedings are not against the ship, which was lost in the voyage, whereby the seamen have lost their wages. It is without question, that the contract is a mat-

ter properly conusable by the common law, and of right only sueable in the common law courts, where the plea would be a bar, and the suit in the admiralty court is only by indulgence. It might be otherwise, if there were no remedy to be had but only in that court. But when the parties have proper remedy in the courts of common law, they ought not to deprive us of the benefit of the statute, by suing in the court of admiralty. And since it is only by the favour of this court, that the suit there is allowed, you will not grant a favour to them, which may turn to our prejudice.

Serjeant *Darnall* against the prohibition insisted, that the statute does not extend to the court of admiralty, or other courts proceeding by the rules of the civil law. This is a matter of which they have conusance, and the judge of the admiralty is the proper judge to determine this matter; and after he has given his sentence, this court must give credit to it, and ought not to grant a prohibition in a cause within their jurisdiction, but leave them to proceed according to the rules of their own law. As in cases of hypothecation and barratry. 1 *Rolls, Court* 530. p. 2. *Bernard vers. Bridgman*. Hob. 11. 1 *Rolls, Court* 530, 531, 532. P. 5 *Jac. B. R. Squire's case*. The statute does not extend to suits in that court by the words of it, and it shall not be taken by equity. The statute is not pleaded in a suit of chancery, nor in the ecclesiastical court for a legacy, nor in a suit founded on a particular custom, as a writ *de rationabili parte bonorum*. March 129. 152. *Forre v. Brown*. The statute extends not to an action of debt for arrears of rent by indenture. *Hutt. 109. Freeman vers. Stacy*.

Holt chief justice. If the suit in the admiralty court were for a mere maritime cause, it would be out of the statute; for the statute means only duties sueable at common law, and shall not be extended by equity beyond the letter of it: therefore the statute does not extend to a writ *de rationabili parte bonorum*, nor to a suit in equity. Debt on an award is held not to be within the act, but in this case the suit is for a matter properly sueable at common law, and therefore it seems the statute extends to it. Suppose any of the plaintiffs in the admiralty court had brought his action at common law, would not the statute have extended to it? And the suit in the admiralty court is not *de jure*, but by indulgence. As to the cases cited by my brother *Darnall*, not one of them is applicable to the present case. The sentence of a civil law court in a foreign realm shall be executed in a court of the same nature here, and proceeding after the same law; and no prohibition, because the temporal courts proceed by a due law, and we (a) must give credit to the sentence; as it was adjudged in the time of *Charles the Second*, between *Hughes* and *Cornelius*.

(a) Vide ante 895. and the books there cited. Ser. 1078.

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Statute of limitations does not extend to a suit in equity. Vide Burr. 961. 3 P. Wms. 143. 309. Mitford 2d Ed. 212.

Sentence of civil law court in a foreign realm executed here.

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An *English* ship was taken at sea by a *French* vessel after the peace made between us and the *Dutch*, wherein *France* was left out, and the ship was carried into *France*, and condemned there as a *Dutch* ship, and afterwards the ship came into *England*; and in an action of *trover* brought by the owner of the ship against the vendee it was adjudged, that by the sentence in the court of *France*, though it were an unjust sentence, the property was altered; and the vendee had judgment.

Powell justice. I agree that the statute shall not be extended by equity beyond the letter, and therefore they do not allow the plea in chancery. I agree also that an action is maintainable at common law on this contract, and that the plea would be a bar. But it seems hard to allow the plea in this case. But upon reading the plea *Powell* justice took an exception to it, and said you have pleaded it ill. For you say, reciting the libel, that it appears thereby, that no suit was prosecuted for this matter within six years after the time it is alledged to be due, being the time limited by the statute. Now it is not material when the debt is laid in the libel to accrue, but you must plead, that the cause of action did not accrue within six years. Suppose you should plead to an action at common law, that it appears by the declaration, that six years are elapsed since the action accrued, would that be good? Now you pray a prohibition, not because they proceed in a matter wherein they have no jurisdiction, but because the judge has over-ruled your plea which he ought to have allowed; and if the statute had been pleaded in this manner at common law, we should have given the same judgment and over-ruled it too, and shall we then grant a prohibition as upon an ill sentence? Plead it right; we will not award a prohibition, because they over-rule an ill plea. And though it be insisted, that the judge founded his sentence upon the insufficiency, and not the informality of the plea, we will not examine the reasons of the sentence.

Holt chief justice *acc.* Suppose it appears on the face of the libel, that the cause of action accrued above six years since, is that a cause for a prohibition? Surely not, for the plaintiff may have sued out process before. As at common law, you cannot take advantage of the statute on the declaration, but must plead it, because the plaintiff ought to have liberty to reply, that process was sued out before and continued, or that he was beyond sea, or, the like. This is not only informally pleaded, but a fault in substance; for not having alleged directly that the cause of action arose above six years before, you have hindred the plaintiffs from replying a matter to help themselves. And though the substance and matter of the plea be good, and ought to be allowed, yet being ill pleaded the sentence is good; and if they have given a good sentence, though
upon

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JONES.

upon ill reasons, that is no foundation for a prohibition; for we will not examine the reasons of their judgment; that will be set right on an appeal. Though I am not satisfied, that no prohibition ought to go, when the proceeding only is erroneous. The sentence is given on the plea as it is pleaded, and you make the over-ruling the plea the ground of your motion, but shall we grant a prohibition for over-ruling an ill plea? If the judge ought to have admitted the allegation when he has not, that is a proper *gravamen* for an appeal. Perhaps the plaintiffs were beyond sea, and did not return within the six years, and then they are out of the statute. *Powell* agreed. Discharge the rule for a prohibition, *per totam curiam*.

It was afterwards moved again, but a prohibition still denied; but it seemed chiefly because the defendants had appealed, for a prohibition was granted in *Easter* term between *Hide* and *Partridge* in the same case.

Note, that was only in order to declare, &c. that the point might be more solemnly settled.

On the debate of this matter *Holt* chief justice said, that a devisee may maintain an action at common law against the terre-tenant for a legacy devised out of land. I make no question of it, for where a statute, as the 32 & 34 *Hen.* 8. of wills, gives a man a right, he shall have an action to recover it of consequence; because his right is created by act of parliament: and where an act of parliament creates a right, or forbids a thing to be done, an action lies *ex consequenti* on the statute for the party grieved. *H. J.*

A person to whom a legacy is given out of land may bring an action for it at common law against the terre-tenant. S. C. 6 Mod. 26. Salk 415. Holt 419. vide Cowp. 291.

Regina *vers.* Potter et alios.

S. C. 6 Mod. 17. Holt 157. with some difference, Salk. 149.

AN indictment was preferred against the defendants before the justices of peace on the statute 12 C. 2. c. 24. for assaulting and beating a custom-house officer. On a traverse of the indictment the defendants were convicted, but before judgment given they obtained a *certiorari* to remove the record of conviction. Mr. Attorney general moved for a *procedendo*, for they cannot remove the record of conviction only, for by that means they prevent the justices from giving judgment; they ought to stay till judgment given, and then bring their writ of error. There is a *capias* out against the defendants to bring them in, for the justices cannot give judgment and set a fine upon them, in their absence, unless they appear, no more than this court can, as was held in the case of *Mead* the quaker on a conviction on the conventicle act.

The defendant may have a *certiorari* to remove a conviction upon an indictment before justices of the peace after a verdict for the crown and before judgment. Vide Com. *certiorari* A. 7. 2d Ed. vol. 2. p. 16. But it is in the discretion of the court to grant a *procedendo*. And it is general will.

Mr.

REGINA
POTTER.

Mr. Broderick for the defendant. We shall take exceptions in arrest of judgment, and matters of law are more fit to be determined here than before the justices. Such *certioraris* have been allowed to remove *recordum convictionis*, and a *certiorari* is the only method in this case, for a writ of error does not lie here, no more than on a conviction before the justices by virtue of any particular authority.

Holt chief justice. Without question we may award a *certiorari* after conviction, and before judgment, though it be founded on an indictment; and it may be reasonable to do it in some cases, as was done on the indictment of murder between *Lisle* and *Armstrong*; and in the time of *Scroggs* chief justice, on a conviction upon an indictment for words in *Gloucester*, a *certiorari* was awarded, to the end the king's bench might give the judgment for the greater example. We usually grant a *certiorari*, where it appears to us to be such a conviction, upon which no writ of error lies. And it was the old course of the crown-office, first to remove the whole record and proceedings on an indictment by *certiorari*, and then bring a writ of error *quod coram vobis residet*, even after judgment given on the indictment. But though we may grant a *certiorari*, yet we will consider whether it be proper or not; and therefore since the defendants have stood a trial before the justices, it is reasonable the justices should give judgment also: therefore take a *procedendo*, and let the defendants bring their writ of error, if they think fit. Powell justice agreed.

Ashby vers. White et alios.

S. C. Holt 324. 6 Mod. 45. Declaration post. vol. 3. p. 320. Record 8. St. Tr. 89.

A man who has a right to vote at an election for members of parliament may maintain an action against the returning officer for refusing to admit his vote. S. C. Salk. 19. 3. Salk. 17. Vide 1 Bro. Parl. Cas. 49. 8 St. Tr. 89. post. 1105. Tho' his right was never determined in parliament. S. C. Salk. 19. 3. Salk. 17. And tho' the persons for whom he offered to vote were elected.

PLacita coram domino rege apud Westmonasterium de termino sancti Hilarii anno 13 Will. 3. Regis. Rot. 460. Bucks, ff. Matthias Ashby queritur de Willielmo White, Ricardo Talbois, Willielmo Bell, et Ricardo Heydon, in custodia marescalli, &c. pro eo videlicet, quod cum 26 die Novembris 12 Will. 3. e curia cancellariæ ipsius domini regis nunc apud Westmonasterium in comitatu Middlesexie emanavit quoddam breve ipsius domini regis nunc tunc vicecomiti Bucks prædicti directum, recitando quod dictus dominus rex de advisamento et assensu consilii sui pro quibusdam arduis et urgentibus negotiis eundem dictum dominum regem, statum, et defensionem regni sui Angliæ, et ecclesiæ Anglicanæ concernentibus, quoddam parlamentum suum apud civitatem suam Westmonasterium sexto die Februarii tunc proxime futuri, teneri ordinaverit, et ibidem cum prælatis, magnatibus, et proceribus dicti regni sui colloquium habere et tractatum, idem dominus rex nunc eidem tunc vicecomiti Bucks per dictum breve præ-

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cepit firmiter injungendo, quod facta proclamatione in proximo dicto comitatu suo post receptionem ejusdem brevis tenendo de die et loco prædictis, duos milites gladiis cinctos magis idoneos et discretos comitatus prædicti, et de qualibet civitate comitatus illius duos cives, et de quolibet burgo duos burghenses de discretioribus et magis sufficientibus, libere et indifferenter per illos, qui hujusmodi proclamationi interfèrent juxta formam statuti inde editi et provisi, elegi, et nomina eorundem militum, civium, et burghensium sic eligendorum in quibusdam indenturis inter ipsum tunc vicecomitem et illos, qui hujusmodi electioni interfèrent inde conficiendis (licet hujusmodi eligendi præsentem forent vel absentes) inseri, eosque ad dictos diem et locum venire faceret, ita quod iidem milites plenam et sufficientem potestatem pro se et communitate comitatus, &c. civitatum et burgorum prædictorum divisim ab ipsis haberent, ad faciendum et consentiendum his, quæ tunc ibidem de communi consilio dicti regni ipsius domini regis nunc, favente Deo, contingerent ordinari super negotiis antedictis, ita quod pro defectu potestatis hujusmodi, seu propter improvidam electionem militum, civium, aut burghensium prædictorum, dicta negotia infecta non remanerent quovis modo, et electionem illam in pleno comitatu ipsius tunc vicecomitis factam distincte et aperte sub sigillo suo et sigillis eorum qui electioni illi interfèrent eidem domino regi nunc in cancellaria sua ad dictos diem et locum certificaret indilate, remittens eidem domino regi alteram partem indenturæ prædictæ eidem brevi consutam, una cum brevi illo; quod quidem breve postea et ante prædictum sextum diem Februarii in brevi prædicto mentionatum, scilicet 29 Decembris anno 12 supradicto apud burgum de Aylesbury prædictum in dicto comitatu Bucks, euidem Roberto Weeden armigero tunc vicecomiti ejusdem comitatus Bucks deliberatum fuit in forma juris exequendum; virtute cujus quidem brevis prædictus Robertus Weeden vicecomes comitatus Bucks prædicti ut præfertur tunc et ibidem existens, postea et ante prædictum sextum diem Februarii, scilicet 30 Decembris anno 12 supradicto apud burgum de Aylesbury prædictum in dicto comitatu Bucks, fecit quoddam præceptum suum in scriptis sub sigillo ipsius Roberti Weeden officii sui vicecomitis comitatus Bucks prædicti, constabulariis burgi de Aylesbury prædicti directum, recitando diem et locum parliamenti prædicti tenendi, perinde eos requirens et eis in mandatis dans, quod facta proclamatione infra burgum prædictum de die et loco in eodem præcepto recitatis, causarent libere et indifferenter eligi duos burghenses burgi illius de discretioribus et magis sufficientibus per ipsos qui hujusmodi proclamationi interfèrent, juxta formam statutorum in talibus casibus editorum et provisorum, et nomina dictorum burghensium sic electorum (licet præsentem forent vel absentes) inseri in quibusdam indenturis inter dictum vicecomitem et illos qui haberent interesse in hujusmodi electione, et quod eos venire faceret ad diem et locum in eodem præcepto recitatos, ita quod dicti burghenses haberent

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plenam et sufficientem potestatem pro se et communitate burgi prædicti ad faciendum et consentiendum iis, quas tunc ibidem de communi consilio dicti regni, favente Deo, contingerent ordinari super negotiis antedictis, ita quod pro defectu hujusmodi potestatis, aut propter improvidam electionem burgensium prædictorum, dicta negotia infecta non remanerent, et quod electionem indilate eidem tunc vicecomiti certificarent, mittentes eidem vicecomiti alteram partem indenturæ prædictæ dicto præcepto annexam, ut idem vicecomes eandem certificaret dicto domino regi in cancellaria sua ad diem et locum prædictos: quod quidem præceptum postea et ante prædictum sextum diem Februarii, scilicet eodem 30 Decembris anno supradicto, apud burgum de Aylesbury prædictum in dicto comitatu Bucks, eisdem W. W. R. T. W. B. et R. H. ad tunc et usque ad et post retornam ejusdem brevis constabulariis burgi de Aylesbury prædicti existentibus, in forma juris exequendum deliberatum fuit, quibus quidem W. W. &c. ratione officii sui prædicti constabulariorum burgi prædicti executio præcepti illius de jure ad tunc et ibidem pertinuit: virtute cujus quidem præcepti ac vigore brevis prædicti iidem burgenses burgi prædicti existentes in ea parte debite præmoniti postea et ante sextum Februarii, scilicet 6 Januarii anno 12, &c. apud burgum de Aylesbury prædictum, coram eisdem W. W. &c. constabulariis prædictis assemblati fuerunt ad duos burgenses pro burgo illo eligendum, secundum exigentiam brevis et præcepti prædictorum, et durante assemblatione illa ad intentionem illam, et antequam hujusmodi duo burgenses virtute brevis et præcepti prædicti electi fuerunt, scilicet die et anno ultimo supradictis, apud burgum de Aylesbury prædictum in comitatu prædicto, idem Matthias Ashby ad tunc et ibidem existens burgensis et inhabitans burgi prædicti, et elemosynas ibidem aut alibi ad tunc aut antea non recipiens, sed debite qualificatus et intitulatus existens ad suffragium suum ad eligendum duos burgenses pro burgo prædicto secundum exigentiam brevis et præcepti prædicti danum coram eisdem W. W. &c. quatuor constabulariis burgi illius, quibus tunc et ibidem debite pertinuit ad suffragium ipsius Matthias Ashby de et in præmissis capiendum et allocandum, paratus fuit et obtulit suffragium suum dare pro eligendo Thomam Lee baronnetum, et Simonem Mayne armigerum, duos burgenses pro parlamento illo, virtute et secundum exigentiam brevis et præcepti prædictorum; ac suffragium ipsius Matthias tunc et ibidem de jure debuit admitti, et prædicti W. W. &c. sic constabularii burgi prædicti tunc et ibidem existentes, tunc et ibidem requisiti fuerunt per ipsum Matthiam Ashby ad suffragium ipsius Matthias Ashby prædicti in præmissis recipiendum et allocandum: iidem tamen W. W. &c. ad tunc et ibidem constabularii burgi prædicti existentes, præmissorum non ignari, sed machinantes et fraudulenter et malitiose intendentes eundem Matthiam Ashby in hac parte damnificare, et de privilegio suo de et in præmissis prædictis impedire

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impedire et totaliter frustrare, eundem M. A. suffragium suum in ea parte dare adtunc et ibidem obstruxere et adtunc et ibidem penitus recusavere ad eundem M. A. suffragium suum pro eligendo duos burghenses pro burgo illo ad parliamentum prædictum dare permittendum, ac suffragium ipsius M. A. pro electione illo non receperunt neque allocaverunt: ac duo burghenses de burgo illo pro parlamento prædicto (prædicto M. A. sic, ut præfertur, excluso) sine aliquo suffragio ipsius M. A. adtunc et ibidem virtute brevis et præcepti prædicti electi fuerunt; in enervationem prædicti privilegii ipsius M. A. de et præmissis prædictis: unde idem M. A. dicit quod deterioratus est et damnum habet ad valentiam 200 librarum, et inde producit sectam, &c.

After a verdict for the plaintiff on not guilty pleaded, it was moved in arrest of judgment by serjeant *Whitacre*, that this action was not maintainable. And for the difficulty it was ordered to stand in the paper, and was argued *Trin. 1 Q. Anne* by Mr. *Weld* and Mr. *Mountague* for the defendants, and this term judgment was given against the plaintiff, by the opinion of *Powell*, *Powys*, and *Gould*, justices, *Holt* chief justice being of opinion for the plaintiff.

Gould justice. I am of opinion, that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff for there are no foot-steps to warrant such an opinion, but only a single case. I am of opinion, that this action is not maintainable for these four reasons: first, because the defendants are judges of the thing, and act herein as judges: secondly, because it is a parliamentary matter, with which we have nothing to do: thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely *damnum sine injuria*: fourthly, it relates to the publick, and is a popular offence.

As to the first, the king's writ constitutes the defendant a judge in this case, and gives him power to allow or disallow the plaintiff's vote. For this reason it is, that no action lies against a sheriff for taking insufficient ball, because he is the judge of their sufficiency. So is the of *Medcalf v. Hodgeson*, *Hutt.* 120. and their sufficiency is not traversable, 1 *Lev.* 86. *Bentley v. Hore*. Upon the same reason the resolution of the court is founded in the case of *Hammond v. Howell*, 2 *Mod.* 218. that no (a) action lies against a man for what he does as a judge. 9 *Hen.* 6. 60. p. 9.

(a) Vide ante 454, and the books there cited.

2. This is a parliamentary matter, and the parliament is to judge whether the plaintiff had a right of electing or not; for it may be a dispute, whether the right of election be in a select number, or in the populace; and this is proper for

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(a) D. cont.
1 Will. 127.

the parliament to determine, and not for us; and if we should take upon us to determine, that he has a right to vote, and the parliament be of opinion that he has none, an inconvenience would follow from contrary judgments. So in 2 *Ventr.* 37, *Onslow's* case, it is adjudged, that no (a) action lies for a double return of members to serve in parliament. The resolution of the king's bench in the case of *Barnardiston v. Soame*, 2 *Lev.* 114. was given on this particular reason, that there had been a determination before in parliament in favour of the plaintiff. And *Hale* said, we pursue the judgment of the parliament; but the plaintiff would have been too early, if he had come before; and yet that judgment was reversed.

3. It is not any matter of profit, either in *presenti* or in *futuro*. To raise an action upon the case, both damage and injury must concur, as is the case of 19 *Hen.* 6. 44. cited *Hob.* 267. If a man forge a bond in another's name, no action upon the case lies, till the bond be put in suit against the party: so here; it may be this refusal of the plaintiff's vote may be no injury to him, according as the parliament shall decide the matter; for they may adjudge, that he had no right to vote, whereby it will appear, the plaintiff was mistaken in his opinion as to his right of election, and consequently has sustained no injury by the defendant's denying to take his vote.

4. It is a matter which relates to the public, and is a kind of popular offence, and therefore no action is given to the party; for by the same reason one man may bring an action, a hundred may, and so actions infinite for one default; which the law will not allow, as is agreed in *Williams's* case, 5 *Co.* 73. a. and 104. b. *Boulton's* case. Perhaps in this case after the parliament have adjudged the plaintiff has a right of voting, an information may lie against the sheriff for his refusal to receive it. So the case of *Fard v. Hoskins*, 2 *Cro.* 368. 2 *Brownl.* 194. Such an action as this was never brought before, and therefore shall be taken not to lie, though that be not a conclusive reason. As to the case of *Sterling v. Turner*, 2 *Lev.* 50. 2 *Ventr.* 50. where an action was brought by the plaintiff, who was candidate for the place of bridge-master of *London*, for refusing him a poll, and adjudged maintainable, there is a loss of a profitable place. So the case of *Herring v. Finch*, 2 *Lev.* 250. where the plaintiff brought an action on the case against the defendant, for that the plaintiff being a freeman, who had a voice in the election of mayor, the defendant being the present mayor refused to admit his voice; in that case the defendant is guilty of a breach of his faith: and in both these cases the plaintiff has no other remedy, either in par-

parliament or any where else, as the plaintiff in our case has. So that I am of opinion, that judgment ought to be given for the defendant upon the merits. But upon this declaration the plaintiff cannot maintain any action, for the plaintiff does not allege in his count, that the two burgesses elected were returned, and if they were never returned, there is no damage to the plaintiff. See 2 *Bulstr.* 265. But I do not rely upon this fault in the declaration.

Powys justice. I am of the same opinion, that no action lies against the defendant, 1. Because the defendant as bailiff is *quasi* a judge, and has a distinguishing power either to receive or refuse the votes of such as come to vote, and does preside in this affair at the time of election: though his determination be not conclusive, but subject to the judgment of the parliament, where the plaintiff must take his remedy.

2. If the defendant misbehave himself in his office by making a false or double return, an action lies against him for it on the late statute, 7 & 8 *W. 3. c. 7.* and therein all this matter of refusing the plaintiff's vote is comprised, and all the special matter is scann'd in that action. And if you allow the plaintiff to maintain an action for this matter, then every elector may bring his action, and so the officer shall be loaded with a number of actions, that may ruin him; and he may follow one law suit, though he may not be able to follow many. These actions proceed from heat, I will not call it revenge; and it is not like splitting of actions, *scilicet*, of one cause of action into many, but the causes of action are several, and the court cannot unite them, but *A. B. C. D. E.* and a hundred more, may at this rate bring actions.

3. There is a vast intricacy in determining the right of electors, and there is a variety, and a different manner and right of election in every borough almost. As in some boroughs every potwaller has a right to vote, in some, reſiants only vote, and in others the out-lying burgesses that live a hundred miles off; nay, I know *Ludiow* a borough, where all the burgesses' daughters husbands have a right to vote. But now all this matter is comprised in an action against the officer for a false return. But it is objected, that by the law of *England* every one who suffers a wrong has a remedy; and here is a privilege lost, and shall not the plaintiff have a remedy? To that I answer, first, it is not an injury, properly speaking; it is not *damnum*, for the plaintiff does not lose his privilege by this refusal, for when the matter comes before the committee of elections, the plaintiff's vote will be allowed as a good vote; and so in an action upon the case by one of the candidates for a false return,

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this tender of his vote by the plaintiff shall be allowed as much as if it had been given actually and received. And if this refusal of the plaintiff's vote be an injury, it is of so small and little consideration in the law, that no action will lie for it; it is one of those things within the maxim, *de minimis non curat lex*. In the case of *Ford v. Hoskins*, 2 Cro. 368. Mo. 833. 2 Bulstr. 336. 1 Roll. Rep. 125, where an action is brought against the lord of a copyhold manor, for refusing to accept one named as successor for life by the preceding tenant for life, according to the custom, there the plaintiff suffers an injury, and yet it is adjudged, that no action lies. The late statute 7 & 8 W. 3. c. 7. gives an action against the officer for a misfeasance to the party grieved, *i. e.* to the candidate, who is to (a) give his vote; so that by the judgment of the parliament he cannot have any action. Before the statute of 23 H. 6. no (b) action lay for the candidate, who was the party aggrieved, against the officer, for a false return, because it related to parliamentary matters, as is adjudged 3 Lev. 29, 30. *Onslow v. Rapley*, and yet he had an injury; and till the 7 & 8 W. 3. no (c) action lay for the candidate against the officer for a double return, as is adjudged in the same case, 3 Lev. 29. 2 Vent. 37. and yet he suffered an injury thereby; *a fortiori* no action shall lie for the plaintiff in this case.

(b) D. cent. 1
1 Will. 127.

(c) D. cent.
1 Will. 127.

(d) Vide Co.
Litr. 8s. b.
13 Ed. n. 2.

(e) D. cent.
1 Will. 127.

4. This action is not maintainable for another reason, which I think is a weighty one, *viz.* this action is *primæ impressionis*; never the like action was brought before, and therefore as (d) *Littleton*, f. 108. uses it to prove that no action lay on the statute of *Merton*, 20 H. 3. c. 6. *si parentes conquerantur*, for if it had lain, it would have sometimes been put in use: so here. So in the case of *lord Say and Seal v. Stephens*, Cro. 142. for the law is not apt to catch at actions. It is agreed by the consent of all ages, that no (e) action lay at common law against the officer for a double return; and yet in one year, *viz.* 1641. there were no less than seventy double returns, and yet they made no act to help it, though the parliament could not be misconfusant of the matter.

5. Another reason against the action is, that the determination of this matter is particularly reserved to the parliament, as a matter properly confusable by them, and to them it belongs to determine the fundamental rights of their house, and of the constituent parts of it, the members; and the courts of *Westminster* shall not tell them who shall sit there. Besides, we are not acquainted with the learning of elections, and there is a particular cunning in it not known to us, nor do we go by the same rules, and they often determine contrary to our opinion without doors. The late

(a) Qu. Whether the word "give" is not improperly substituted for the word "have."

statute, which enacts, that the last determination of the house as to the right of election shall be a rule to the judges in the trial of any cause, is a declaration of their power, and the paths the judges are to walk in are chalked out to them, so that they are not left to use their own judgment; but the determination of the house is to be the rule of law to us, and we are not to examine beyond that. Suppose in this action we should adjudge one way, and after in parliament it should be determined another way; or suppose a judge of *nisi prius*, before whom the cause comes to be tried, should say, I am not bound by the rule of the last determination in parliament in this action, for this is another sort of action; not within the meaning of the statute; these things would be of ill consequence.

6. Another reason against this action is, that if we should allow this action to lie for the plaintiff, *a fortiori* we must allow an action to be maintainable for the candidates against the defendant for the same refusal; for the candidates have both *damnum et injuriam*, and are the parties aggrieved; and if we should allow that, we shall multiply actions upon the officers at the suit of the candidates, and every particular elector too; so that men will be thereby deterred from venturing to act in such offices, when the acting therein becomes so perilous to them and their families. I will not insist upon the exceptions to the declaration, but give my opinion upon the merits. I think there is a sufficient allegation in the count of the return of the election, especially after a verdict. Nor shall I insist, that it does not appear in the declaration, how near the party was to be chosen; nor that this action is brought merely for a possibility, for this is an action for a personal injury, and the plaintiff might give his vote for which he pleased, either the candidate that had fewer or more voices, or he might give his vote for one who had no other burgess's voice but the plaintiff's own; for the plaintiff in those cases is deprived as much of his privilege, as if the person for whom he voted was nearest to be chosen. But it has been objected, that the defendant should not have absolutely refused to receive the plaintiff's vote, but should have reserved it for a scrutiny, and should have admitted it *de bene esse*. To that I answer, he might indeed have done so, but he was not obliged to do it, for the officer is supposed to know every man's right and pretence of election, and commonly the weaker party are for bringing in new votes, and devising new contrivances; but the officer ought to disallow them at first, and not to give so much countenance to such a practice, as to reserve it for a scrutiny. As here in *Westminster-hall*, when a matter of law comes before us, if it be a clear case, we may give judgment in it on the first argument, and it will be a good judgment, although it be usual to hear several arguments. The objection of weight

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is the resolution between *Sterling* and *Turner*, 2 *Lev.* 50. *Hale* said it was a good precedent: and the case of *Herring* and *Finch*, 2 *Lev.* 250. though as to that case it was not adjudged upon the matter of law, but went off upon a point of evidence; yet I will admit the action to lie for the plaintiff in those cases, but they do not at all relate to the parliament, but are matters of custom merely relating to the government of the city, and are properly determinable at common law. And although it may be said, that this case also relates to the government of the town, so does a public nuisance in a highway; but if a particular person receive an injury, he may have his action; but that does not relate to the parliament as this matter does, and the whole case here turns upon that, viz. its being a parliamentary matter. If we should admit this action to lie, we shall have work enough in *Westminster-hall* brought in by a side-wind; nay, so much, that we shall even be glad to petition the parliament to take this power away from us. Besides, the judgment here cannot be called properly a determination, it will only be a litigation; for our judgment cannot be cited as an authority in parliament, nor will the parliament mind it, or be bound up by it, for they (a) themselves are not bound even by their own determination, but may determine contrary to it, though that be a rule upon the courts of *Westminster*. But it has been objected, that this is no determination of the election in this judgment, but only of a particular injury. To that I answer, it will be in consequence of a determination of the election; for if the plaintiff had a right to vote, then this action is maintainable; if he has no right, then he can have no action; and by consequence twenty others may have a right to vote, and the election may turn upon this single vote; and his right of voting is as much parliamentary as the whole election, and may as much intangle the case. It is said in *Onslow's* case, 2 *Ventr.* 37. that the courts at *Westminster* must not enlarge their jurisdiction in these matters, farther than the statute gives them; and indeed it is a happiness to us, that we are so far disengaged from the heats, which attend elections. Our business is to determine of *meum* and *tuum*, where the heats do not run so high, as in things belonging to the legislature: therefore this being an unprecedented case, I shall conclude with a saying of my lord *Coke*, 2 *Bull.* 338. *Omnis innovatio plus novitate perturbat quam utilitate prodest.*

Powell justice. I am of the same opinion, that judgment ought to be arrested. As to the novelty of this action, I think it no argument against the action; for there have been actions on the case brought, that had never been brought before, but had their beginning of late years, and we must judge upon the same reason as other cases have been determined by. I do not agree with my brother upon

(a) Vide 2 G. 2.
c. 24. s. 4.
1 Dougl. on
Elections 18.

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upon their first reason, that the defendant is a judge. I do not understand what my brother *Powys* means by saying, he is *quasi* a judge; surely he must be a judge or no judge. The bailiff is not a judge, but only an officer, or minister to execute the precept. But I agree with them in their other reasons to give judgment against the plaintiff, and chiefly because in this action there does not appear such an injury or damage as is necessary to maintain an action on the case. An injury must have relation to some privilege the party has. The case of *Turner and Sterling*, 2 Lev. 50. is adjudged upon a particular reason; for the defendant by refusing him the poll, deprived him of the means of knowing whether he had a right or not. If *cessuy que use* desires the feoffees to make a feoffment over to another, and they refuse, no action upon the case lies against them for this refusal. And in the case of *Ford against Hoskins*, 2 Bulstr. 337. 2 Cro. 368. it is resolved, that no action lies for the nominee against the lord, for refusing to keep a court, and to admit him; yet that is a hard case, for the party is thereby deprived of the means of coming to his right. But that case differs from the case of *Sterling against Turner*; for the party hath a known remedy in chancery, to compel the lord to hold a court, and admit him, but the other hath no remedy against the mayor but an action. Here is no injury to the plaintiff, for though he has alleged in his declaration, that he had a right to vote, and was hindered of it by the defendant, yet that does not give him a right, unless the finding thereof by the jury do confer such right; but that cannot be so, for the jury cannot judge of this right in the first instance, because it is a right properly determinable in parliament. The parliament have a peculiar right to examine the due election of their members, which is to determine whether they are elected by proper electors, such as have a right to elect; for the right of voting is the great difficulty in the determination of the due election, and belongs to the parliament to decide. But it is objected, admitting the plaintiff had a right to vote, and was deprived of it, shall he have no remedy? To that I answer, he shall have a remedy in proper time, but the plaintiff here comes too soon, he shall have a remedy by action after the parliament have determined that he had a right, but not before. This is not such a right, the deprivation whereof will make an injury, till it be determined in parliament. But the plaintiff has a proper remedy by petition to the parliament setting forth his case, and after the parliament have adjudged that he had a right of voting, he shall have an action at law to recover damages, when his right is so fixed and settled. The opinion of my lord *Hobart* in the case of Sir *William Elvis* and the archbishop of *York*, *Hob.* 317, 318. and the reason of that opinion comes very near to the present case, That if the church be litigious, and two clerks be presented to the ordinary, and he award a *jura patronatus*, to

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to inquire which patron has the right, and the inquest find for one, and yet the ordinary receive the clerk of the other, contrary to the finding of the jury, in that case if the other patron bring his *quare impedit* against the usurper and his incumbent, not naming the bishop, and proves his title, he may afterwards have an action upon the case against the ordinary, for that wilful wrong delay and trouble, that he hath put him to; and he shall recover costs and damages, not in respect of the value of the church (for there are no damages for that by the common law, but by *West. 2. 13 Ed. 1. ff. 1. c. 5. f. 3.* but for the other respects before mentioned. But if he name the ordinary in the *quare impedit*, he can have no other action of the case; neither shall he have such action upon the case before he hath tried his title in a proper action, and against the proper parties. So that in that case, though the patron's right, being found by the jury on the *jure patronatus*, is in some measure determined, yet he shall not maintain an action upon the case against the ordinary, but he must first prove his title in a proper manner by a *quare impedit*, and thereby prove the ordinary a disturber; and after that he may bring his action on the case against the ordinary for his damages. Where the party has no possibility of settling his right, as in the case of *Sterling and Turner*, there he shall maintain his action for the disturbance before his right be settled; but where he has a proper method, as in our case, he shall not maintain an action till his right be determined; and the reason of this difference is very strong, because of the inconveniencies of contrary determinations upon the several actions, or of the different judgments by the house of commons, and the judges at common law: for the house may be of opinion that the plaintiff has a right to vote, and yet the judges may be of opinion upon the action that he hath none, and give judgment against him, and then though he has a right he will have no remedy: *et e converso*. But this difference of opinions will be prevented by such a previous application to the house before any action brought. Besides in this case, here is not a damage upon which this action is maintainable; for to maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion or consequence of law. For a possibility of a damage, as an action upon the case lies for the owner of an ancient market, for erecting a new market near his; and yet perhaps the cattle that come to the old market might not be sold, and so no toll due; and consequently no real damage, but there is a possibility of a damage. But in our case there is no possibility of a damage. It is laid in the declaration, that the defendant obstructed him from giving his vote; but that is too general, without shewing the manner how he obstructed him, as that the defendant kept him out of the usual place, where the votes are taken. The plaintiff shews

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shews no damage in his count, and the verdict will not supply it, for the plaintiff ought always to allege a damage; as in an action upon the case brought against the lessee by him in the reversion, for refusing to permit him to enter to view waste, it would not be sufficient to allege thus generally, that the defendant obstructed him, &c. It is laid here, that the defendants *ipsum* the plaintiff *ad suffragium suum dare obstruxerunt, et penitus recusaverunt*, I do not know what that means in this case. Indeed it is a sufficient description of a disseisin of a rent seck, but if the plaintiff gives his vote for a candidate, that is as effectual as if the officer writ it down, for it is his vote by the giving of it, and the officer cannot hinder him of it, and on a poll it will be a good vote, and must be allowed, and so there is no wrong done to the plaintiff; for his vote was a good vote notwithstanding what the defendant did. Besides the plaintiff can make no profit of his vote; and it is like the case of a *quare impedit*, in which the plaintiff at common law recovered no damages, because he ought not to sell the presentation, and so could make no profit of it. So here, for it would be criminal for the plaintiff to sell his vote. Perhaps the putting the plaintiff to trouble and charge, to maintain and vindicate his right of voting, might be sufficient damage to maintain an action on the case; but as our case is, I cannot see that the plaintiff has received any damage. Great inconveniencies do attend the allowance of this action, as my brothers have said; as that it will occasion multiplicity of actions, and for that reason it is, that the law gives no action to a private person for a publick nuisance, for there is a remedy by indictment to redress it. So here the plaintiff has a remedy in parliament. As to the case of *Westbury* against *Powell*, *Co. Lit.* 50. *a.* where the inhabitants of *Southwark* had a watering place for their cattle by custom, which was stopped up; there any inhabitant might have an action, because there was no other remedy by presentment or the like: but if it had been a nuisance presentable, no (a) action would have lain. So in the case of *Sterling* and *Turner*, the party had no other remedy. So in the case of *Herring* and *Finch*, which is a strong case; and I do not know whether an action will lie in that case, for refusing to admit his voice to the election of a mayor; but there the plaintiff has no other remedy, nor other way to settle his right. If we should adjudge, that this action lies, it will be dangerous to execute any office of this nature, and will deter men from undertaking publick offices, which will be a thing of ill consequence. I am of opinion upon the whole matter, that after a determination in the parliament for the plaintiff's right, the trouble and charge of vindicating it will maintain an action, but in this case no action lies, and therefore the judgment ought to be arrested.

(a) Vide ante
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Holt chief justice. The single question in this case is, Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer.

I am of opinion that judgment ought to be given in this case for the plaintiff. My brothers differ from me in opinion, and they all differ from one another in the reasons of their opinion; but notwithstanding their opinion, I think the plaintiff ought to recover, and that this action is well maintainable, and ought to lie. I will consider their reasons. My brother *Gould* thinks no action will lie against the defendant, because, as he says, he is a judge; my brother *Powys* indeed says, he is no judge, but *quasi* a judge; but my brother *Powell* is of opinion, that the defendant neither is a judge, nor any thing like a judge, and that is true: for the defendant is only an officer to execute the precept, *i. e.* only to give notice to the electors of the time and place of election, and to assemble them together in order to elect, and upon the conclusion to cast up the poll, and declare which candidate has the majority.

But to proceed, I will do these two things: First, I will maintain that the plaintiff has a right and privilege to give his vote: Secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

I did not at first think it would be any difficulty, to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it. It is not to be doubted, but that the commons of *England* have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exerciseable by them in their proper persons, and therefore by the constitution of *England*, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the commons of *England* vested in them: and this representation is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs; and these are the persons qualified to represent all the commons of *England*. The election of knights belongs to the freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold, than the freehold itself can be taken away. Before the statute of 8 H. 6. c. 7. any man that had a freehold, though never so small, had a right of voting, but by that statute the right of election is confined to such persons as have lands or tenements

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ments to the yearly value of forty shillings at least, because as the statute says, of the tumults and disorders which happened at elections, by the excessive and outrageous number of electors; but still the right of election is as an original right, incident to, and inseparable from the freehold. As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation. Now boroughs are of two sorts; first, where the electors give their voices by reason of their burgership; or, secondly, by reason of their being members of the corporation. *Littleton*, in his chapter of tenure in burgage 162. *C. L.* 108. b. 109. says, Tenure in burgage is, where an ancient borough is, of the which the king is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage: and *Sect.* 164. he says, and it is to wit, that the ancient towns called boroughs be the most ancient towns that be within *England*, and are called boroughs, because of them come the burgesses to parliament. So that the tenure of burgage is from the antiquity, and their tenure in socage is the reason of their estate, and the right of election is annexed to their estate. So that it is part of the constitution of *England*, that these boroughs shall elect members to serve in parliament, whether they be boroughs corporate or not corporate; and in that case the right of election is a privilege annexed to the burgage land, and is, as I may properly call it, a real privilege. But the second sort is, where a corporation is created by charter, or by prescription, and the members of the corporation as such chuse burgesses to serve in parliament. The first sort have a right of chusing burgesses as a real right, but here in this last case it is a personal right, and not a real one, and is exercised in such manner as the charter or custom prescribes; and the inheritance of this right, or the right of election itself, is in the whole body politic, but the exercise and enjoyment of this right is in the particular members. And when this right of election is granted within time of memory, it is a franchise that can be given only to a corporation, as is resolved by all the judges against my lord *Hobart*, in the case of *Dungannon* in *Ireland*, 12 Co. 120, 121. That if the king grant to the inhabitants of *Islington*, to be a free borough, and that the burgesses of the same town may elect two burgesses to serve in parliament, that (a) such a grant of such privilege to burgesses not incorporated is void, for the inhabitants have not capacity to take an inheritance. See *Hob.* 15. The principal case there was, the king constituted the town of *Dungannon* to be a free borough, and that the inhabitants thereof shall be a body politic and corporate, consisting of one provost, twelve

The right of electing members to parliament can not be granted at this time day, except to a corporation.

(a) Vide Co. Litt. 3, a

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The wages for the member of a corporation are to be raised out of the estates of the individuals who compose the corporation, not out of the corporation fund.

free burgesses, and commonalty; and in the same name may sue and be sued; *et quod ipsi præfati præpositi et liberi burgenses burgi prædicti et successores sui in perpetuum habeant plenam potestatem et auctoritatem eligendi, mittendi, et retinendi duos discretos et idoneos viros ad inserviendum et attendendum in quolibet parlamento, in dicto regno nostro Hiberniæ in postmum tenendo*, and so proceeds to give them power to treat, and give voice in parliament, as other burgesses of any other ancient borough, either in Ireland or England, have used to do. And upon this grant it was adjudged, by all the judges of England, that this power to elect burgesses is an inheritance of which the provost and burgesses were not capable, for that it ought to be vested in the intire corporation, *viz.* provost, burgesses, and commonalty, and that therefore the law in this case did vest that privilege in the whole corporation in point of interest, though the execution of it was committed to some persons, members of the same corporation. 12 Co. 120, 121. *Hob.* 14, 15. As to the manner of election, every borough subsists on its own foundation, and where this privilege of election is used by particular persons, it is a particular right vested in every particular man; for if we consider the matter, it will appear, that the particular members and electors, their persons, their estates, and their liberties, are concerned in the laws that are made, and they are represented as particular persons, and not *quatenus* a body politic; therefore, when their particular rights and properties are to be bound (which are much more valuable perhaps than those of the corporation) by the act of the representative, he ought to represent the private persons. And this is evident from all the writs, which were anciently issued for levying the wages of the knights and burgesses that served in parliament. As 46 *Edw. 3. Rot. Parl. memb. 4. in dorso*. For when wages were paid to the members, they were not assessed upon the corporation, but upon the commonalty as private persons, as the writ shews, which indeed is directed to the sheriff, or to the mayor, &c. yet the command is, *quod de communitate comitatus, civitatis, vel burgi, habere faciat militibus, civibus, aut burgensibus, 10 l. pro expensis suis*. But now, if the corporation were only to be represented, and not the particular members of it, then the corporation only ought to be at the charge; but it is plain that the particular members are at the charge. And this is no new thing, but agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the particular members, and to be enjoyed by them in their private capacity. As is the case of *Waller and Hanger, Mo. 832, 833.* where the king granted to the mayor and citizens of London, *quod nulla prisagia sint soluta de vinis civium et liberorum hominum de Londonia, &c.* And there it was resolved, that although the grant be to the corporation, yet it should not enure to the body

body politic of the city, but to the particular persons of the corporation, who should have the fruit and execution of the grant for their private wines, and it should not extend to the wines belonging to the body politic; and so is the constant experience at this day. So in the case of *Mellor v. Spateman*, 1 *Saund.* 343. where the corporation of *Derby* claim common by prescription, and though the inheritance of the common be in the body politic, yet the particular members enjoy the fruit and benefit of it, and put in their own cattle to feed on the common, and not the cattle belonging to the corporation; but that is not indeed our case. But from hence it appears that every man, that is to give his vote on the election of members to serve in parliament, has a several and particular right in his private capacity, as a citizen or burgeses. And surely it cannot be said, that this is so inconsiderable a right, as to apply that maxim to it, *de minimis non curat lex*. A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes: as in the statute of 34 & 35 H. 8. c. 13. intituled an act for making of knights and burgeses within the county and city of *Chester*; where in the preamble it is said, that whereas the said county palatine of *Chester* is and hath been always hitherto exempt, excluded, and separated out, and from the king's court, by reason whereof the said inhabitants have hitherto sustained manifold dissensions, losses, and damages, as well in their lands, goods, and bodies, as in the good, civil, and politic governance, and maintenance of the commonwealth of their said county, &c. So that the opinion of the parliament is, that the want of this privilege occasions great loss and damage. And the same farther appears from the 25 Car. 2. c. 9. an act to enable the county palatine of *Durham* to send knights and burgeses to serve in parliament, which recites, whereas the inhabitants of the county palatine of *Durham* have not hitherto had the liberty and privilege of electing and sending any knights and burgeses to the high court of parliament, &c. The right of voting at the election of burgeses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. These reasons have satisfied me as to the first point.

2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for (a) want of right and want of remedy are reciprocal. As if a purchaser of an advowson in fee-simple, before any presentment, suffer an usurpation, and six months to pass, without bringing his *quare impedit*, he (b) has lost his right to the advowson, because he has lost his *quare impedit*, which was his

(a) D. 1cc. 6
Co. 48. b. vide
post 964.

(b) Sed nunc
vide 7 Ann. c.
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(a) Vide H. Bl.
1. Litt. f. 514.
Co. Litt. 293. a.

(b) Vide 6 Co.
58.

(c) Vide 1 Bl.
Com. 38.

his only remedy; for he (a) could not maintain a writ of right of advowson; and though he afterwards usurp and die, and the advowson descend to his heir; yet (b) the heir cannot be remitted, but the advowson is lost for ever without recovery. 6 Co. 50. Where a man has but one remedy to come at his right, if he loses that he loses his right. It would look very strange, when the commons of *England* are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff, or other officer, to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind. Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it, no body can say, that the defendant has done well; then he must have done ill, for he has deprived the plaintiff of his right; so that the plaintiff having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. How else comes an action to be maintainable by the party on the statute of 2 Ric. 2. *de scandalis magnatum*, 12 Co. 134. but in consequence of law? For the statute was made for the preservation of the publick peace, and that is the reason that no writ of error lies in the exchequer chamber by force of the statute of 27 Eliz. in a judgment in the king's bench on an action *de scandalis*, for it is not included within the words of the statute; for though the statute says, such writ shall lie upon judgments in actions on the case, yet it does not extend to that action, although it be an action on the case, because (c) it is an action of a far higher degree, being founded specially upon a statute, 1 Cro. 142. If then when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. But there wants not a statute too in this case, for by *West. 1. 3 Ed. 1. c. 5.* it is enacted, that forasmuch as elections ought to be free, the king forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice or menaces, shall disturb to make free election. 2 *Inst.* 168, 169. And this statute, as my lord *Coke* observes, is only an inforcement of the common law; and if the parliament thought the freedom of elections to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free; it is a violation of that statute, to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable.

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And I am of opinion, that this action on the case is a proper action. My brother *Powell* indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there. And in these cases the action is brought *vi et armis*. But for invasion of another's franchise, trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *reterna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompence. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a publick nuisance, every one shall have his action, as is agreed in *William's case*, 5 Co. 73. a. and *Westbury and Powell, Co. Lit.* 56. a. Indeed where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for in that case the law will not multiply actions. But it is otherwise, when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case *per quod communiam suam in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway, every passenger shall not bring his action, but the (a) party shall be punished by indictment; because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of *Turner against Stirling*, the plaintiff was not elected, he could not give in evidence the loss of his place as a damage, for he was never in it; but the gist of the action is, that the plaintiff having a right to stand for the place, and it being difficult to determine

(a) Vide ante
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who had the majority, he had therefore a right to demand a poll, and the defendant by denying it was liable to an action. If publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences. So the case of *Hunt and Dowman*. 2 Cro. 478. where an action on the case is brought by him in reversion against lessee for years, for refusing to let him enter into the house, to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be supposed.

But in the principal case my brother says, we cannot judge of this matter, because it is a parliamentary thing. O! by all means be very tender of that. Besides it is intricate, and there may be contrariety of opinions. But this matter can never come in question in parliament; for it is agreed that the persons for whom the plaintiff voted were elected; so that the action is brought for being deprived of his vote: and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to inroach or enlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people: but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us without inroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

My brother *Powell* says, that the plaintiff's right of voting ought first to have been determined in parliament, and to that purpose cites the opinion of my lord *Hobart* 318. that the patron may bring his action upon the case against the ordinary after a judgment for him in a *quare impedit*, but not before. It is indeed a fine opinion, but I do not know whether it will bear debating, and how it will prove, when it comes to be handled. For at common law the patron had no remedy for damages against

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Against the disturber, but the statute 13 Ed. 1. st. 1. c. 5. f. 3. gives him damages; but if he will not make the bishop a party to the suit, he has lost his remedy which the statute gives him. But in our case the plaintiff has no opportunity to have remedy elsewhere. My brother Powys has cited the opinion of Littleton on the statute of Merton that no action lay upon the words, *si parentes conquerantur*, because none had ever been brought, yet he cannot depend upon it. Indeed that is an argument, when it is founded upon reason, but it is none, when it is against reason. But I will consider the opinion. Some question had arose on the penning of that statute on those words, *si parentes conquerantur*, &c. what was the meaning of them, whether they meant a complaint in a court in a judicial manner. But it (a) is plain the word *conquerantur*, means only *si parentes lamentantur*, that is only a complaint in pais, and not in a court; for the guardian in socage shall enter in that case, and shall have a special writ *de ejectione custodiæ terræ et hæredis*. But this saying has no great force, if it had it would have been destructive of many new actions, which are at this day held to be good law. The case of *Hunt and Downham* before mentioned was the first action of that nature, but it was grounded on the common reason, and the ancient justice of the law. So the case of *Turner and Sterling*. Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but on the reason of the law, and *ubi eadem ratio, ibi idem jus*. This privilege of voting does not differ from any other franchise whatsoever. If the house of commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we must not be frightened when a matter of property comes before us, by saying it belongs to the parliament; we must exert the queen's jurisdiction. My opinion is founded on the law of England. The case of *Mors and Slur*, 1 Vent. 190, 238. was the first action of that nature, but the novelty of it was no objection to it. So the case of *Smith and Crasshaw*, 1 Cro. 15. W. Jones 93, that an action of the case lay for falsely and maliciously indicting the plaintiff for treason, though the objections were strong against it, yet it was adjudged, that if the prosecution were without probable cause, there was as much reason the action should be maintained, as in other cases. So 15 Car. 2. C. B. between *Bodily and Long*, it was adjudged by *Bridgman* chief justice, &c. that an action on the case lay for a riding, whenever the plaintiff and his wife fought, for it was a scandalous and reproachful thing. So in the case of *Herring and Finch*, 2 Lev. 250. no body scrupled, but that the action well lay, for the plaintiff was thereby deprived of his right. And if an action is maintainable against an officer for hindring the plaintiff from

(a) Vide Litt.
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voting for a mayor of a corporation, who cannot bind him in his liberty nor estate, to say, that yet this action will not lie in our case, for hindering the plaintiff to vote at an election of his representative in parliament, is inconsistent. Therefore my opinion is, that the plaintiff ought to have judgment.

(a) Vide 1 Bro.
Parl. Cas. 45.

Friday the 14th of January 1703. this (a) judgment was reversed in the house of lords, and judgment given for the plaintiff by fifty lords against sixteen. *Trevor* chief justice and baron *Priest* were of opinion with the three judges of the king's bench. *Ward C. B.* and *Bury* and *Smith* barons were of opinion with the lord chief justice *Holt*, *Tracy* dubitante, *Nevill* and *Blencowe* absent.

(Note, I had it from good hands, that *Tracy* agreed clearly, that the action lay, but was doubtful upon the manner of laying the declaration.)

Upon the arguments of this case *Holt* chief justice said, the plaintiff has a particular right vested in him to vote. Is it not then a wrong and an injury to that right, to refuse to receive his vote? So if a borough has a right of common, and the freemen are hindered from enjoying it by inclosure or the like, every freeman may maintain his action. This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage, but what is pecuniary, and a damage to property. If a man has *retorna brevium*, although no fees were due to him at common law, yet if the sheriff enters within his liberty, and executes process there, it is an invasion of his franchise, and he may bring his action; and there is the same reason in this case. Although this matter relates to the parliament, yet it is an injury precedentaneous to the parliament, as my lord *Hale* said in the case of *Bernardiston vers. Soame*. 2 *Leu.* 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompence. Let all people come in, and vote fairly; it is to support one or the other party, to deny any man's vote. By my consent if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his *English* right, and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to chuse such persons, as are to bind a man's life and property by the laws they make.

MR. *Dee* prayed a *mandamus* to restore the clerk of the butchers' company, which is a company by charter. *Holt* chief justice. Such *mandamus*'s have been granted, but I think they have gone too far in these cases. I am opinion, that no *mandamus* ought to be granted where the officer may have an assize, therefore hear counsel of both sides.

Post. 1004.

A *mandamus* was afterwards granted.

Baker *vers.* Pierce.

S. C. Salk. 695. Holt 654. 6 Mod. 23.

IN an action on the case for words, *John Baker* stole my box-wood, and I will prove it. After a verdict for the plaintiff, serjeant *Darnall* moved in arrest of judgment, that those words are not actionable, for they shall be taken to mean wood growing or the like, whereof only a trespass can be committed. So to say, you are a thief, and have stolen my timber, or my apples, or my hops, is not actionable. For where words may import either a felony, or a trespass, they shall be taken in the mildest sense, unless there be other words to determine them in the worst sense. As to say, he stole my timber out of my yard, or my hops in a bag. *Hob.* 331. *Clerk vers. Gilbert.* *Hutton* 113. *Herbert v. Angell.* See *Hutton* 38. *Mason v. Thompson.* I charge thee with felony for taking forth from *J. D.*'s pocket, and I will prove it; the words were held not to be actionable, because it should not be intended to mean a felony, not being directly affirmed. [But *Holt* chief justice and the court denied that case to be law, for the taking out of a man's pocket must be intended a felonious taking.] In this case the words may be taken to mean box-wood growing; and although the defendant might mean them in the worst sense, yet the intent of the speaker shall not make the words actionable, unless the words express it sufficiently. Suppose the defendant had said, he stole my coppice-wood.

To charge a man with stealing wood is actionable. R. acc. 2 Keb. 261. Difference between timber and timber trees, per *Broderick.* H. J.

Holt. The words, I charge thee with felony import that it was a felonious taking. H. J.

Mr. *Broderick* for the plaintiff. These words are actionable, and the difference is founded on this rule, *Arbor dum crescit, lignum cum crescere nescit*, and therefore box-wood in this case must be intended wood cut down, whereof a felony may be committed. *Yelv.* 152. *Higgs v. Austin.* Thou hast stolen as much wood and timber as is worth twenty shillings, adjudged actionable. *Noy* 114. *Short's case.* 1 Roll. action 70. n. 47, 48. *Lifford and Stamp.* *March.* 211. 2 *Cro.* 166. *Lee and Saunders* 674. *Smith and Ward.* *Hob.* 77. *Coote and Gilbert.* *Sty.* 9. 3 *Cro.* 471.

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The words in this case according to common parlance import a thing of which felony may be committed, and therefore he prayed judgment for the plaintiff.

Holt chief justice. I have heard *Twissden* justice say, he knew no rule to go by in actions for words.

Gould justice. So said my lord *Hale*; for all words stand on a different bottom.

Holt chief justice. In most cases where such words as these have been held actionable, there are other words of an ill sense to explain them. As I charge you with felony, or you are a thief. And stealers of coppice-wood are called in common parlance stealers of wood.

Powell justice. No action will lie for saying, you have stole my coppice-wood, for that must be intended growing; but to say generally you have stole my wood, that must be intended wood cut down, and there are many cases founded on the difference in that verse cited by Mr. *Braderick*.

Holt chief justice agreed the difference.

Powell justice. To say you are a thief, for you have stolen, or you are a thief and have stole, must mean both the same. And though it was formerly held, that there was a difference between them, yet (a) of late it has been taken otherwise; for *for* or *and* are explanatory, and mean both the same thing.

(a) Vide Bull.
§.

Holt chief justice. It has gone both ways.

Afterwards the court gave judgment for the plaintiff, that the words are actionable, notwithstanding the opinion in 2 *Cro* 166. to the contrary. And *Holt* said, Sure the plaintiff must have judgment. It is not worth while to be very learned on this point, but where words tend to slander a man, and take away his reputation, he shall be for supporting actions for them, because it tends to preserve the peace. I remember a story told by Mr. justice *Twissden*, of a man that had brought an action for scandalous words spoken of him, and upon a motion in arrest of judgment, the judgment was arrested; and the plaintiff being in court at that time said, that if he had thought he should not have recovered in his action, he would have cut his throat. *Powell* justice. This case in 2 *Cro*. 166. cited by my brother *Darnall*, is so; but the later books are contrary, and I will stick to the latter authorities, being grounded on so much reason. *Gould* justice said, that in the 10 *Car*. 2. *Mich*. term, it was adjudged, that these words, Thou hast stole my wood, were actionable.

Squire and Grevett.

S. C. but with some inconsiderable difference. Salk. 74. Holt 81. 6 Mod. 33.

A Writ of error upon a judgment given in the king's bench, in an action of debt upon a bond of arbitration, the defendant prays *oyer* of the condition, which was to perform the award, &c. and pleads, that the arbitrators made no award: the plaintiff replies an award made *de et super præmissis* whereby the arbitrators did award, *quod omnis prosecutio in aliqua seâta dependente inter partes cessaret, et abinde determinata sit, et quod dictus Johannes Grevett solveret dicto Johanni Squire summam 17 l. 3s. 11 d. super 10 diem Octobris tunc proximo sequentem, in pleno omnium damnorum et demandorum, ac etiam quod ipse idem Johannes Grevett super dictum 10 diem Octobris ad proprias misas et custagias sua sigillaret et deliberaret dicto Johanni Squire unam generalem relaxationem omnium actionum, et causarum actionis, seclorum, clameorum, et demandorum quorumcunque a principio mundi usque dictum 10 diem Octobris, et quod dictus Johannes Squire super receptionem suam dictæ summe 17 l. 3s. 11 d. faceret, sigillaret, et deliberaret dicto Johanni Grevett unam generalem relaxationem omnium actionum, et causarum actionis, seclorum, clameorum, et demandorum quorumcunque a principio mundi usque dictum 10 diem Octobris, and the plaintiff assigns his breach: the defendant rejoins *nul tiel agard*; and issue thereon, and a verdict for the plaintiff, and judgment in the common pleas. On a writ of error in this court and the general errors assigned, Mr. Parker took three exceptions to the award: first, that it is not final, for it is not awarded that all actions shall cease, but that the prosecution in any suit depending between the parties shall cease, which goes only to the suspension of the present prosecution, and not to the right of action; and though it should be taken to extend to stay the prosecution during the lives of the parties themselves, yet it might be revived again by their executors. Secondly, that the 17 l. 3s. 11 d. awarded to be paid by Grevett to Squire, is awarded to be paid upon a day after the award, in full of all demands, &c. which must intend all demands, &c. to that day, and so the award too large, and includes more time than the submission. 3. He admitted, that the release to be given by Squire to Grevett would be good as to the time of the submission, and void for all the time after; but in this case the money is awarded to be paid *super 10 diem Octobris* in full of all demands to that day, and that Squire *super**

An award that the prosecution in any suit depending between the parties should cease and be thenceforth determined destroys the right of action, and is sufficiently final. Vide Str. 1024.

An award that one party should on a future day pay the other a sum of money in full of all demands, is good. R. acc. 3 Lev. 188.

Especially if it imports to be made upon the premises,

and is of itself sufficiently mutual and final. vide Burr. 274. Bl. 1117. Com. 328. Cro. Jac. 447.

An award of releases up to a time after the submission is not wholly void, but will oblige the parties to give releases up to the time of the submission, R. ante 106.

And see the books there cited. Cape v. Manroe. B. R.

T. 24 O. 2. vide Com. Arbitrament. E. 2. 2d Ed. vol. 1. p. 382. Under an award that the one party shall pay the other a sum of money, and that he shall on the receipt of it give the former a general release, the former may insist upon such release if he tenders the money, tho' the other will not receive it. An offer to do a thing is so far equivalent to performance that it will entitle the person who made it to demand whatever he was to have upon the performance, R. acc. 1060, 1064, and vide Dougl. 259, 659. 1 T. R. 638.

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receptionem inde, &c. should give a release; so that the tender being to be made in full of all demands to a time after the submission, and not in any other manner, *Squire* is not bound to receive it so, and then no release to be made by him, for the release is not to be given but *super receptionem*, and the receipt is a condition precedent to the giving the release; and if the tender be made in satisfaction of all demands to the time of the submission, that would not have intitled *Grevett* to a release, and so the award not final.

Pengelly for the defendant in error. As to the first exception, he insisted that the award was good and final; for it shall be taken according to the usual construction in cases of awards, not merely as a suspension or delay of the prosecution, but in extinguishment of the right and duty, and then no prosecution can be carried on or revived by the executors. That since an award, that all actions shall cease, is agreed to be final, much more shall this; for the word prosecution or suit is a more large and comprehensive word than the word action; and it is *Littleton's* text, *sect.* 504. C. L. 291. that a release of all suits, or prosecutions, which are synonymous, will discharge not only all actions, but all executions too. He that has no right of prosecution can have no right of action, for *actio est jus prosequendi*. He cited several cases to this purpose, as the case of *Boll* and *Hescott*, which was adjudged in this court *Passb.* 11 Will. 3. where the award was, that one party should pay to the other 20*l.* at a day subsequent, and that he should give the other a bond for payment of the money accordingly within four days, and that all prosecutions and suits should cease till failure of performance; and this was held to be final, for if he paid the money, &c. the award was absolute, and the cessation perpetual, and he should not take advantage of his own non-performance. So the case of *Milward* and *Stokes*, 1 Roll. Abr. 261. 1 Danv. 540. pl. 7. the award was made concerning an obligation, in which one was bound to the other, that the obligee should not prosecute or cause to be prosecuted any suit against the obligor upon the said obligation; it was adjudged a good award, and final, and that thereby the duty was extinguished. And these cases he said were stronger than the present case. 2 Mod. 227, 228: *Strangford v. Green*. 1 Lev. 58. *Knipe's* case, 1 Roll. 254. n. 10. As to the second and third exceptions, he first premised, that the award was made, and so recited to be, pursuant to the submission; that it was averred to be made *de et super præmissis*, that there was no averment of any matter or controversies arisen since the submission. Then he said the second exception was not truly stated, for the words are general, *quod solveret, &c. super 10 Oblatoris in pleno omnium damnorum et demandorum*, and not in *pleno omnium demandorum usque ad dictum diem*: and it must be therefore construed to mean all demands, &c. to the time of the submission, and not to the time after, the tenth of

An award that one party should in four days give the other a bond for the payment of a sum of money at a future day, and that all suits should cease till failure of performance is sufficiently final.

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of *October*; and therefore the arbitrators shall never be supposed to have made their award of more than was submitted to them, or to a time beyond their power, viz. after the submission, unless it be so expressly limited in the award; for they shall not be intended to have exceeded their authority, nor supposed to have done a vain and a void thing. However, if it were expressed to be paid in full of all demands, &c. to the tenth of *October*, yet it would be good to the time of the submission, and only void, *pro tanto*, viz. the time after. And since Mr. Parker admitted, that the release was good to the time of the submission, and void for the time after, it was very strange and particular, that he should deny this part of the award to have the same operation: for the power is equally extensive, and must be exceeded as much as to one part of the award as to the other, and no more; and therefore a (a) tender in full of all demands to the time of the submission would be a good performance of the award, and the other party is bound to receive it as such. Nor indeed can it be tendered in any other manner, viz. in full of all demands, &c. to the tenth of *October*, because to all the time beyond the submission the award is void, and the plaintiff might refuse to receive it, if it had been so tendered. But in the first case upon a tender he ought to receive, and thereupon he ought to give the release, and the words *super receptionem* do not amount to a condition precedent, and make the release depending upon the former part of the award, which is void, or impossible to be done, or not mutually obligatory. To prove this he cited these cases, 1 Roll. Abr. 260. p. 5. *Lewin and Hills*. Allen 26. 1 Sid. 154. *Rows v. Nun*. 1 Sid. 252. *Manning and Warring*. 1 Lev. 132, 133. *Hopper v. Hackett*. 1 Roll. Abr. 260. n. 4. *Etnoke and Otwell*. 2 Mod. 169. *Adams and Adams*. 1 Roll. Abr. 260. n. 1. 254. n. 12. *Popely and Popely*. 260. n. 2. *Franklyn and Emlyn*. 244. n. 23. *Alabaster and Clifford*. Hut 20. 2 Mod. 309. *Hill and Thorn*. 1 Roll. Abr. 256. n. 1. *Goffe and Browne*, Hob. 190. But admitting the award to be void as to the release, yet he insisted, that upon the other parts, which were distinct and independent, the award was mutual and final. That the money being awarded in satisfaction, gave the plaintiff a right of action; and might be pleaded in bar by the defendant in any action brought by the plaintiff on the original contract. And to that purpose he cited the case of *Kinnafton and Jones*, 1 Roll. Abr. 258, 256. n. 3, 6. Allen 85. Sty. 97. as this case in point. 1 Roll. 259. n. 4, 5. *Ingram and Webb*, and *Sayer and Sayer*. 2 Cro. 663. 2 Roll. Rep. 192. 1 Roll. Abr. 244. n. 21, 22. *Valore and Trib*. 1 Roll. Rep. 437. 2 Cro. 447, 448. *Lumley and Hutton*. 3 Cro. 861. *Goodman and Fountain*. And therefore however it happened as to the release, the other parts of the award were sufficient without it; and so he prayed that the judgment might be affirmed.

(a) Vide ante
116. and the
cases there cited.

Holt

SQUIRE
GREVETT.

(a) Vide ante
953

The release of
an action re-
leases the right
of action.

Holt chief justice. The first part of the award, that all prosecutions, &c. shall cease, goes to the cause of action, and is not to be restrained only to the prosecution then depending. Where a man has but one remedy to come at his right, a (a) release of that remedy is a discharge of his right. As if a man release all actions, he releases all causes of action, and determines his right. So if a man releases all actions now depending, he releases the right of action. So if the plaintiff after the *darrein continuance* release the action depending, he releases his right of action. And if a release shall have that operation, why shall not an award? The words here are not only *quod prosecutio cessaret*, but also *et abinde determinata sit*, which implies a perpetual cessation. Therefore these words in the award do not only discharge the present suit, but also the right of action, because the plaintiff has no other remedy but by action, and then the award is mutual and final on that part only without more.

And as to the second clause in the award, surely it is well, and it is final, for the money is awarded in satisfaction, and though it should be taken to extend to a time after the submission (which shall not be intended) yet it will be good, for it shall not be understood that there were any other causes of action arisen after the submission, and then no damage to the plaintiff, though he receive it in satisfaction to the 10th of October. If there had been any new controversies, the defendant should have set it forth in his plea, and even that he tendered the money in full of all matters to the time of the submission.

As to the last exception, the question is, if the words *super receptionem* do not imply a liberty in the plaintiff, to refuse the money when tendered? A tender and refusal has been formerly held no performance without actual payment, as in the case of *Hunt and Craven*. But it has been adjudged otherwise since. But admitting the award void as to the release, yet it is good for the rest.

(b) Vide post
1082. 2 Will.
268. 293.

Powell justice. The law is against Mr. Parker upon all three points, though if (b) the award be good upon any one of the three points, it will be sufficient, since they are distinct and independent clauses. The first part of the award must be taken to refer to the cause of action, and not merely to mean a suspension of the action, but to determine it for ever; and the word [depending] is only to describe the nature of the action, and does not import that the cause shall stand still for a time. The next part of the award as to the payment is mutual and final, for it is not to be paid in full of all demands to the 10th of October, but to the time of the submission, and shall be so intended. Besides, if it

did extend to the 10th of October, it would yet be good for the time to the submission, and void for all the time after; for it is a thing severable in its nature. Then as to the giving the release *super receptionem* of the money, that will not give the plaintiff a liberty to refuse the money, for he must accept it, and when one party is awarded to pay, the other by implication is awarded to receive it, and I believe it has been so adjudged.

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An award that one party shall pay the other a sum of money obliges the latter to receive it. Vide ante 611.

Holt chief justice. I doubt that, whether an award that one shall pay, implies that the other is thereby obliged to receive.

Upon which *Perigelly* cited the case of *Linnen v. Williamson*, adjudged according to *Powell's* opinion, which is reported 1 *Roll. Abr.* 254, 255. 1 *Danv.* 531. n. 16. and the same is agreed 2 *Cro.* 447. *Lumley* and *Hutton*.

Holt chief justice. The award to pay money in satisfaction is pleaded in bar, though the other party be not awarded to accept it; for the award of payment of money vests a duty in the party, and is a bar in debt, or trespass, or *assumpsit*. And the old books are, that upon a *parol* submission, if any collateral matter were awarded to be done, other than the payment of money, as the making a release, or the like, no action lay for non-performance; yet (a) it has been otherwise adjudged since. For when two persons submit, they actually promise to perform the award, and an action lies on the mutual promises. An award only to pay money in satisfaction is of itself final, therefore let the judgment be affirmed, *per totam curiam*.

(a) Vide ante 247. 248. post 1040.

Corporation of Grampound's Case.

IF a number of people assemble together in a lawful manner, and upon a lawful occasion, as for electing a mayor (as it was in this case) or the like, and during the assembly a sudden affray happen; this (b) will not make it a riot *ab initio*, but it is only a common affray. But if a number of people assemble in a riotous manner to do an unlawful act, and a person, who was upon the place before upon a lawful occasion, and not privy to their first design, comes and joins with them, he will be guilty of a riot equally with the rest. Holt chief justice with *Powell* justice seemed to agree.

29 E. 3. 741
Register 103.

(b) Acc. 1
Hawk. c. 65.
f. 2.

Phettle *vers.* Wood.

S. C. 6 Mod. 42. Holt 612. Salk. 564, 659.

In an action on recognisance if it is stated to have been taken in court, and upon production it appears to have been taken before a judge at chambers, the variance is fatal.

IN debt against the defendant upon a recognisance of bail in the common pleas, the plaintiff counted, that the defendant *per scriptum suum obligatorum recognitum in curia domine reginæ de banco coram Thoma Trevor milite et sociis suis, &c.* On *nul tiel record*, a recognisance was certified, and it appeared to be taken before *Nevill* justice at his chamber, and for this variance it was adjudged *per totam curiam*, that the plaintiff had failed of his record.

Holt chief justice. It is not the same recognisance, for a recognisance taken before a judge at his chamber, and a recognisance taken in court are different, therefore you have varied in the description of the recognisance. Indeed if it had been entered as originally taken in court, though taken before a judge in his chamber, the declaration would have been well. And in this court the course is to enter them always as taken in court, and a recognisance taken before a judge of this court upon bail is not obligatory till it be entered on a record, because we do not take them in a sum certain: but in the common pleas they take them in a sum certain, and it is a record immediately upon the caption at the judge's chamber, and binds the lands, &c. before it be filed at *Westminster*; and when it is filed, it is then a record in court. And a *scire facias*, or an action of debt, may (a) be brought on such recognisance, either in *London*, where it was taken, or in *Middlesex*, where it was filed, according to the resolution in the case of *Hall* and *Wingfield*, *Hob.* 195. But on a recognisance of bail taken in this court, the action or *scire facias* must (b) always be brought in *Middlesex*.

(a) Acc. Bl. 768.

(b) D. acc. Bl. 768.

Powell justice of the same opinion in *omnibus*, and said, *Rolle* chief justice was of the same opinion with *Hobart*.

Mr. Raymond was of counsel for the defendant.

Mr. Dee for the plaintiff at another day urged, that the precedents in the common pleas are all as this count is.

Holt chief justice. If they proceed hand over head, that is nothing to us. They shall not set up a prescription against law upon pretence of their usage. *Powell* agreed.

See these entries. *Thomp.* 125. 2 *Brownl.* 176. *Brownl. Lat. Red.* 209, 210.

Clarkson *vers.* Buffle.

IN an action of debt upon a bond, the defendant pleaded in bar a composition made with his creditors according to the statute 8 & 9 W. 3. c. 18. to which the plaintiff demurred. And Mr. *Acherly* for the plaintiff took several exceptions to the plea.

a man who would avail himself of it to shew that he absconded before the making of the act.

If an act of parliament makes certain provisions in favour of persons who shall have absconded, 'tis sufficient for

1. Exception. The plea is, that he absconded for debt such a day before the making of the act, but does not say, that he absconded at the time of the making of the act. And though he might be an insolvent person before the making of the statute, yet he may have recovered, and become solvent, when the act was made.

Doctrin, Placit. 55.

No instrument is a deed, which is not delivered. R. acc. ante 760.

Holt chief justice. This is a plea in bar, and is sufficient, if it be good to a common intent; and in this case it shall be intended, that the defendant continued insolvent to the time of the making the statute; and if he became solvent after the time alleged, and before the statute, that ought to come on the plaintiff's side, for as it is pleaded, it is within the words of the act, viz. such as have absconded. *Powell* justice agreed.

2. Exception. The defendant has pleaded the agreement as a deed under seal, but does not produce it in court by a *profert in curia*, as he ought.

Therefore an instrument which a statute directs to be subscribed and be delivered also.

sealed will not be a deed, unless the act directs it to

Holt chief justice. The statute says an agreement subscribed and sealed, &c. and that does not import it to be by deed, for it may be under seal, and yet no deed, and therefore a *profert* is not necessary.

Powell justice. It is not required by the act, nor pleaded, to be delivered, and it cannot be a deed without delivery; it must be subscribed and sealed by the act, but subscription is not necessary to a deed.

R. acc. ante 760.

3. Exception. By this agreement the defendant is to pay — per pound at a day, which is six months after the making of the statute; and it is further agreed, that upon payment thereof the creditors shall give to the defendant general releases. Now this agreement cannot be within the meaning of the act to bind the non-subscribing creditors, because it obliges them to give releases for debts, which may have accrued to them since the act, and it will be unreasonable to oblige the other creditors to release them.

No instrument need be pleaded with a *profert* which is inferior in nature to a deed. R. acc. ante 760. If an act of parliament authorises a certain proportion of a man's creditors to enter into

any agreement they may think right for all the creditors, an agreement that he shall pay so much in the pound at a future day, and that each creditor shall then give him a general release is good.

Holt

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Holt chief justice. This agreement must be understood to extend only to debts within the meaning of the act of parliament, viz. to debts due before the making of the statute, and the agreement of two thirds of the creditors does not oblige the non-subscribing creditors with respect to any debt contracted after the making the act; and although the subscribing creditors may have obliged themselves by this agreement to give releases of all matters to a day after the act, yet they cannot oblige the rest as to any debt accruing after. *Powell* justice agreed a release of all debts, &c. to the time of the act, will be a sufficient performance of this agreement by the non-subscribing creditors, within the meaning of the statute.

Judgment for the defendant *per totam curiam nisi*, &c.

The Queen *vers.* Hoskins.

S. C. 6 Mod. 53.

The addition of servant is a sufficient addition within the 1st H. 5. c. 5. S. C. *Holt* 41 cont. Br. additions. pl. 55. Indictment. pl. 49. 2 Inst. 668. *Dyer* 46. b. pl.

2. vide Com. Abatement. F. 26, 2d Ed. vol. 1. p. 34, 35. No objection can be taken to the caption of an indictment the term it comes in. Vide ante 125.

MR. *Williams* moved to quash an indictment for want of an addition. The defendant was indicted by the name of T. S. servant, which he said is not a good addition within the statute 1 H. 5. c. 5. But *per Holt* chief justice, *et curiam*, it is a good addition, for it is certain. He would have taken some exceptions to the caption, but it was not allowed, for coming in of this term, such errors are amendable in the same term.

Taylor *vers.* Sea.

IN *assumpsit* on several promises the defendant pleads, *quod ipse performavit omnia ex parte sua performanda*, and the plaintiff demurred for that cause. Mr. *Ward* for the plaintiff this plea, if any thing, amounts to the general issue. And it was adjudged for the plaintiff *per totam curiam*.

Lord Bridgewater *vers.* Duke of Bolton.

S. C. 3 Salk. 315.

A mortgage in fee after a devise in fee, is not a total revocation of the devise. Acc. 8 Vin. 153. in the notes to pl. 6.

Vide 1 P. Wms. 193. 1 Roll. Abr. 616. a. 1 Eq. Abr. 407. 2 Vern. 409. Ogle v. Cook. 20 Feb. 1748. in Canc. Rurr.

IN the argument this term of the case between lord *Bridgewater*, and the duke of *Bolton*, serjeant *Powys*, who argued for my lord *Bridgewater*, said, it had been adjudged in chancery, and is now become a settled rule, that if a man seised in fee of lands make his will thereof, and devise the same to another in fee, and after that make a mortgage of the same lands in fee to a third person, and afterwards die without having paid the money due on the mortgage, that this mortgage does not amount to a total revocation, but only *quoad*, and the equity of redemption shall go to the devisee. And Mr. *Cowper*, who argued on the other side, agreed it.

1960, 2514. 1 Bro. Cha. Caf. 261. 3 P. Wms. 344. Dougl. 684.

Sir Edward Longueville *vers.* the inhabitants of Thistleworth.

S. C. Salk. 498. Holt 518. 6 Mod. 27.

IN an action on the statute of *Winton* for a robbery the defendants pleaded in abatement, and on demurrer a *respondes ouster* was awarded, after which the defendants pray *oyer* of the writ, and accordingly set it forth in their plea, and pleaded over in bar. Mr. *Ward* moved to set it aside for the irregularity. Mr. *Mountague*: The writ being returned and filed, we have a right to demand *oyer* of it in the same term, notwithstanding the award of a *respondes ouster*, if it be necessary for us. And by the original writ in this case it appears, that the writ was not sued out within twenty days, as the statute 39 *Eliz.* (a) requires, and we would by this way prevent a trial and further charge.

Powell justice. When a defendant prays *oyer* of the writ it is with intent to take advantage of some fault in the writ; but the defendant in this case not having demanded *oyer* of the writ before his plea in abatement, and a *respondes ouster* awarded, he is now out of time to have *oyer*, which is only to enable him to plead in abatement: but now the defendant here is to plead in chief.

Holt chief justice. A variance between the declaration and the original may be assigned for error, and although the party admit it, and pass it over in plea, if *oyer* be given of the writ, it will appear; and perhaps in that case the defendant may take advantage of it in arrest of judgment, and so prevent the court from giving an erroneous judgment, and thereby avoid the trouble and charge of a writ of error. And upon a writ of error after such *oyer* had, the party may assign the error, and take advantage of it, without a *certiorari*, because it appears upon the record. It seems reasonable to allow this demand of *oyer* in the same term, and especially when the matter pleaded is not dilatory.

Powell justice. It is out of course, therefore they ought to shew us precedents to warrant it.

Holt chief justice. If the defendants insist upon their *oyer* they must demand it on record, and if we deny to give them *oyer*, when they ought to have it, the denial must be entered, and they may take advantage of it on a writ of error. The question is whether the *respondes ouster* awarded on the plea in abatement be not an *estoppel* to the defendant to demand *oyer*. But on the award thereof we do not adjudge, *quod bene prædictum bonum et sufficiens est in lege*, but

(a) It seems there ought to be an oath that it was not made within, or in the statute 27 *Eliz.* &c. Note to the 1st Edition.

A defendant cannot have *oyer* of the original after he has pleaded in abatement. Vide Dougl. 215. H. 59. Ford v. Burnham. Barnesham. Barnesham. 4to Ed. p. 340. 1 T. R. 149.

(A) Acc. 1719.

quod

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THISTLE
WORTH.

quod placitum of the defendant *minus sufficiens in lege existit*. This is not like pleading a new plea in abatement, which shall not be received; but here the writ being in court, they may demand *oyer* of the writ in the same term with the plea in abatement, though they cannot in a subsequent term.

Powell justice. The demanding and having *oyer* is to enable a man to plead somewhat.

Holt chief justice. No, it is to make the thing appear on record, that so the party may take advantage of any error therein: and if there be a fault in the writ, the defendant may take advantage of it, although he plead any other matter; but it will be a good exception in arrest of judgment, and save the party the trouble of bringing a writ of error. In this court the party may demand *oyer* of a deed after imparlance, though it is not allowed in the common pleas. If the plaintiff contests the giving *oyer*, he must strike out the plea, and demur, or counter-plead the *oyer*. The granting *oyer* will do the plaintiff no harm, for the giving *oyer* where it ought not to be allowed, is no error, nor (a) assignable by the defendant, being in his advantage; but the denial of it, where it ought to be allowed, is error, *quod Powell concessit*. We will consider of it.

(a) Vide ante.
20, 594.

Afterwards at another day *Holt* chief justice, said, we are all of opinion, that *oyer* ought not to be given in this case. I was indeed of opinion, that it ought to have been granted, being in the same term, for the reasons I mentioned, but I am now satisfied, that it ought not; for the true reason why *oyer* of the writ is given to the defendant, is for the defendant to demur for matter which goes to the whole original, or to plead in abatement for some matter contained in the writ, which makes it ill, as that it varies from the count, or from the register, as appears *Ca. Intr.* 320. But when the defendant has pleaded in abatement, he has nothing more to do with the writ. The matter which stuck with me was, that the defendant ought to have *oyer*, that so he might move in arrest of judgment upon the insufficiency of the writ appearing on record as a default; but it is only moved as *amicus curiæ* to inform the court, and to prevent them from giving an erroneous judgment. *Powell* agreed. The law has prescribed and settled the order of pleading, which the party is to pursue, viz. to the (b) jurisdiction of the court, to the disability of the person, to the count, to the writ, and lastly, to the action. Now in this case you have already pleaded in abatement, and might have taken benefit of the *oyer* then, but you cannot pray *oyer* in order to plead in bar; for you have done with the writ, and you cannot plead two dilatories, but must now plead to the action. But *oyer* was never given after a *respondas ouster* awarded,

(b) Acc. Co.
Litt. 303. a.

awarded, to enable the party to plead in chief: to allow this course would be to invert the order of pleading.

LONGUEVILLE

Let the *oyer* be struck out of the plea, *per totam curiam*.

THISTLE-
WORTH.

Regina *vers.* Dixon.

S. C. 3 Salk. 78.

THE defendant was indicted for selling goods, affirming them to be worth so much, whereas in truth they were not, *in deceptionem*, &c. Upon not guilty pleaded the defendant was convicted, and now the record was removed by a *certiorari*, and Mr. Broderick moved to quash it, as not being an offence indictable.

A *certiorari* to remove an indictment, will not remove a conviction upon that indictment, S. C. Salk. 150.

Holt chief justice. Why do you remove it after a trial? But you have given the party no day here in court, as you ought upon the return of a *certiorari* to remove an indictment after conviction. Upon reading the *certiorari*, it appeared to be only for removing the record of the indictment which Holt said was not sufficient to remove the conviction; for if the defendant sue out a *certiorari* to remove an indictment, and stays till he is convicted before he delivers it, he has lost the benefit of it.

On a *certiorari* to remove a conviction upon an indictment, a day must be given to the party for his appearance in court S. C. 6 Mod. 61.

Berwick *vers.* Andrews.

S. C. 6 Mod. 125. Salk. 314. Holt 314.

Intr. Pasch. 2 Ann B. R. Rot. 64.

IN debt by an executor, setting forth, that his testator had recovered a judgment against the defendant, as administrator of J. S. and suggesting, that the defendant had committed a *devastavit* in the life of the plaintiff's testator, so that neither the testator nor the plaintiff could have execution of the said judgment, *per quod actio accrevit* to the plaintiff. Judgment herein was given against the defendant in the common pleas by default, and thereupon a writ of error was brought. Mr. King for the plaintiff in error insisted, that the executor cannot maintain this action for a waste done in the life of his testator; for the executor ought to make himself a party to the original judgment by a judgment on a *scire facias* brought by himself against this administrator, before he can maintain an action of debt upon a suggestion of a *devastavit* in his own time. This method of proceeding by action of debt is a late practice, and the first judgment was obtained with difficulty, viz. the case of *Whitely* against *Lane*. 1 Saund. 216. 1 Lev. 255. which was an action brought by the party himself, who obtained a judgment against the executors; and therefore for the objections

One executor may bring debt against another suggesting a *devastavit* in the life of his testator on a judgment recovered by the testator against the defendant. Vide Com. Administration. B. 3. 2d Ed. vol. 3. p. 241. Morg. 563.

BREWICK
v.
ANDREWS.

No action can
be brought
against an exe-
cutor suggesting
a devastavit
until after a
judgment has
been recovered
against the exe-
cutor. Vide Com.
Administration.
B. 15. 2d Ed.
vol. 1. p. 243.

urged in that case it has been since resolved, that actions of this nature shall not be carried farther than that resolution: as in the case of *Ent v. Withers*, 1 Ventris 315, 321. 2 Lru. 209. 3 Keble 735, 825. where it was adjudged, that such an action would not lie against an executor upon a bond of the testator, before any judgment recovered against the executor. And so it was resolved in this court, Pasch. 11 Will. 3. between *Crosby* and *Geering*. Where an action of debt suggesting a *devastavit* was brought upon a judgment recovered against the intestate, before any judgment recovered against the administrator himself; and upon a demurrer it was resolved, that the action was not maintainable. But the present action is to carry it farther than any of those cases; for here the judgment was recovered by the plaintiff's testator, and the waste is suggested to be done in his time. Now this waste is a personal wrong done to the testator, whereas the foundation of the action is, that the party himself, who brings the action, is intitled to the estate of the testator by matter of record, and so the waste by the executor is a wrong to him. But here the plaintiff has no title to an execution, till he obtain an award of it on a *scire facias*, so that the wasting before he had a right to sue execution can be no injury to him, and consequently he can have no action, and he has founded his action on no other damage, but that by the wasting he could not obtain satisfaction of the said judgment by suing execution. This action is against a rule of law: *Actio personalis moritur cum persona*. No action lay at the common law against the executor of an executor for a *devastavit* of the first executor upon the reason of that rule. But it was given by the statute of Charles 2. (a) But the statute does not extend to this, so that by consequence this action is not maintainable, not being helped by that or any other act of parliament.

(a) 30 Car. 2.
c. 7. l. 2.

Mr. Mountague for the defendant in error urged, that this action would lie. The same objection, that it was *actio personalis*, was made in the case of *Wheatley vers. Lane*, 1 Saund. 216. 1 Sid. 397. and there fully answered; for though the action arises from a *tort*, yet this *tort* vests an interest in the party. As in cases of subtraction of tithes on the statute of Edward 6. (b) and of an escape out of execution, where the executor for that reason shall maintain an action of debt for the subtraction or escape in the time of his testator. This action goes no farther than the former cases. The case of *Cory vers. Thynne*, 2 Sid. 402. is this case in point; for the plaintiff there was executor to him that had obtained the judgment.

(b) 5 & 3 Edw.
6. c. 13.

Holt chief justice. But the executor in that case had recovered a judgment in his own name, on a *scire facias* on the principal judgment.

Moun.

Mountague. The tort vests a debt in the party wronged, and then it survives to the executor, as on the statute of *Edward 6.* And the same objections, as are made now, were made in the case of *Wheatley and Lane*, and there over-ruled by the judges, so that this case in effect is already determined.

Holt chief justice. Surely this action will well lie, and as well for the executor, as for the testator himself. And indeed it is the same thing; for this action is brought against the same person against whom the recovery was had, and by that recovery *assets* were admitted, and then the defendant has wasted. You agree this action might be maintained by the testator himself, but you say, it will not go to his executor, because it is a personal wrong, which dies with him. But is not a mere personal injury. This action is founded on the same reason as an action of debt by the executor for an escape out of execution, in the time of the testator. It is true no action lay against the executor of an executor for the waste of the first executor before the statute, because it was only a wrong committed by the executor. And so no action lies against an executor for an escape out of execution in the time of his testator, for it was a wrong done by another person, for which he shall not answer, nor shall his estate be liable. An executor may (a) maintain an action on the case at the common law for an escape out of execution in the time of the testator, but not (b) for an escape on *mesne* process. So an (c) executor of a parson shall have an action of debt on the statute of *Edw. 6.* for subtraction of tithes in the time of the testator. These are injustices to the testator's right, and within the equity of the statute of *Edw. 3.* (d) *de bonis asportatis in vita testatoris.* So an action on the case for an escape in the time of the testator, a *quare impedit* for a disturbance in the life of the testator, are given to the executor by the equity of that statute. In the case of *Cresby and Gerring* there was no judgment against the administrator, and so it did not appear, that he had *assets*, and it was like the case of *Ent* against *Withers.*

Powell justice. This action shall not be carried farther to charge the defendant, without a judgment first recovered against himself. And my lord *Hale* was of that opinion: he was of counsel with the plaintiff in the case of *Cory* against *Thynne*, and told me, he had judgment for his client beyond his expectation; but now that action is settled. This is not a personal wrong, which lies not against an executor; as an action for an escape in the life-time of

(a) Vide ante 41. Com. Administration, B. 13. 2d Ed. vol. 1. p. 241. (d) D. acc. 4 Mod. 404. Vide Com. Administration, B. 13. 2d Ed. vol. 1. 241. (c) R. acc. Cro. Eliz. 207. Vide Com. Administration, B. 13. 2d Ed. vol. 1. p. 241. (d) 4 Ed. 3. c. 7.

BIRWICK
v.
ANDREWS.

No action lies
against an exe-
cutor for an es-
cape in the time
of his testator.
Vide Com. Ad-
ministration, B.
13. 2d Ed. vol.
1. p. 243.

BIRWICK
ANDREWS.

the testator lies not against an executor. But the statute of *Edw. 3.* is a remedial law, which has always been taken by equity, wherever there is a matter of property in question, it is brought within the statute. So here, the testator had a right in the *assise* in the defendant's hands, and the executor was intitled to that right by a *scire facias*, and this is within the reason of goods taken, &c. It was once a question, whether an executor could maintain an *assumpsit* upon a contract with the testator, because it is founded upon a breach of promise; but it was agreed, that he might, because it was a wrong to the testator's property and estate, and an interest in the testator.

Pouys justice agreed.

Could justice agreed. Here is a debt arising *ex delicto*.

Holt chief justice. Upon this judgment this executor might have sued a (a) *scire facias* as executor, and upon that a *fieri facias*, and might have had a *devastavit* returned thereupon, and upon that a general judgment; now this action is brought in lieu of that proceedings, and that is the reason of this action on suggestion of a *devastavit*.

(a) Vide 2 Rich.
Practice in B.R.
523.

But then an exception was taken by Mr. King to the declaration, and upon that it was adjourned. (Vide 6 Mod. 126.)

Monckton *vers.* Pashley & alios.

S. C. Salk. 638. Holt. 698. but incorrectly 6. Mod. 38.

Whatever trespass may be repeated may be laid with a continuando. Vide ante 239. 823. and the books there cited. Therefore hunting may be laid with a continuando.

IN trespass *de eo quod* the defendants, 1 *Septembris, prima Annæ, &c. vi et armis, &c. clausum* of the plaintiff, *apud &c. frugerunt et intraverunt, et herbam suam ad valentiam 10l. ibidem nuper crescentem, pedibus suis ambulando concucaverunt et consumpservunt, et aliam herbam suam ad valentiam aliorum 10l. ibidem similiter nuper crescentem, cum quibusdam ovis, viz. &c. depasti fuerunt, concucaverunt, et consumpservunt* (and lays several other trespasses upon the same place) *ac liberam warrennam* of the plaintiff, *apud, &c. adunc frugerunt, et intraverunt, et in eodem sine licentia et voluntate ipsius the plaintiff adunc venati fuerunt, et ducentos lepores pretii 10l. adunc et ibidem occiderunt, ceperunt, et asportaverunt, transgressionem prædictam, quod herbas prædictas pedibus ambulando concucationem et consumptionem, ac alias herbas prædictas cum ovis prædictis concucationem et consumptionem, ac in libera warrenna prædicta sine licentia of the plaintiff venationem prædictam, a prædicto primo die Septembris, anno primo prædicti, usque diem exhibitionis hujus billæ, viz. vigesimum*

vigesimum diem Octobris, eodem anno, diversis diebus et vicibus continuando, &c. To this declaration the defendants pleaded not guilty. But the jury found for the plaintiff. And now Mr. Salkeld moved in arrest of judgment, that the *continuando* is laid of a matter, which does not lie in continuance, viz. *quod venationem in libera warrenna* of the plaintiff, for every day's hunting is a several hunting. He said, that it appeared from the books that a trespass with *continuando* does not lie where the act terminates in itself, and can be but once executed: as a trespass *quare equum suum occidit continuando* is ill; because it is not an act, which can be alleged in continuance. So a trespass for breaking his fence, or prostrating his house, lies not with a *continuando*. 2 Roll. Abr. 315. p. 41. 3 Hen. 6 Transf. 19. So a trespass for cutting down his trees *continuando* is ill, as was held in this court in Easter term, between Brooks and Bishop. Ante 823. (vide 21 Hen. 6. 43.) for in these cases the act cannot be repeated. He farther insisted on this difference, that where the first trespass is without an *ouster*, there all the subsequent acts are fresh trespasses; but where by the first trespass there is an *ouster*, there the subsequent acts are not distinct trespasses, but a continuance of the first. And therefore a release of the first trespass will discharge all the subsequent acts in this case, but in the former case it will not, because every day's entry is a fresh trespass: as *Yelv.* 126. *Tbrop and Strickland.* 1 Brownl. 223. 3 Cro. 182. And with this difference must the opinion of *Fitz. N. B.* 91 C. be understood, where he says, that a trespass of his house or close prostrated may be alleged with continuance, or else the books are not reconcileable. 20 Hen. 7. 2. 3. p. 7. but an actual *ouster* must be intended.

MONCKTON
v.
PASHLEY.

Difference
where there is
an ouster in a
trespass, and
where not.

Holt chief justice. Why shall not an actual *ouster* be intended in this case?

Salkeld. I will shew why it cannot. In the case of *Hofkins and Jennings*, 2 Roll. 549. n. 5. it is resolved, that a trespass *quare succidit et asportavit 10 arbores continuando, &c.* is ill. So the case of *Lichford and Elliot*, as it is reported. 1 Sid. 224, 249. trespass for throwing logs on the plaintiff's close *continuando* is ill, and there judgment was given for the plaintiff, because the declaration was, that the defendants *jecerunt* the logs instead of *jacuerunt*, which word was held insensible as to that purpose, and so no damages given for it. Vide 1 Lev. 210, 211. *Butler and Hedges.* 1 Sid. 319. In the case at bar, though the continuance be impossible, yet damages must be intended to be given for it by the jury, because it is expressly alleged to be continued, and so the intentment of the court is excluded, viz. that the jury gave no damages for the continuance, by the shewing

MONCKTON
PARKLEY.

of the party; neither can the court intend, that there was an actual *auster*, because it is alledged, that he entered and hunted such a day and such a day.

Mr. *Mountague* for the plaintiff urged, that the *continuando* is proper, and so is the constant form. He cited *Cicero de Natura Deorum*, and *Terence, continuando potionem*, for the propriety of the word. Here are several defendants, so that one might rest while the others hunted. In this case if the *continuando* be possible, then it will be good after verdict; and if it be repugnant and impossible, then it shall be intended, that the jury gave no damages for it. So is the case of *Lichford vers. Elliot*, 1 Sid. 224. 249. 1 Lev. 220, 211. and *Butler and Hedges*, 1 Sid 319. 1 Lev. 210, 211. And to the same purpose was the resolution of this court last Easter term, in the case of *Brook and Bishop*, ante 823.

Upon the first stirring of this case *Holt* chief justice said, I see no reason, why a man may not allege an entry and hunting on such a day, *continuando venationem prædictam diversis diebus et vicibus* till such a day: the defendant hunts one day and the next, and it is not one act, which continues from one day to another, nor the same trespass. That case in *Yelv.* is not law, the resolution was in favour of the judgment. For if the trespass be brought *continuando*, &c. and the defendant answers to the original trespass; but not to the continuance, if the first act and the continuance were the same trespass, then the continuance would be answered by the answer to the original trespass; but it is not so, for the continuance must be directly and positively answered, because the continuance is a trespass. There is a difference between a *continuando* of a repeated act of the same nature as here, and a *continuando* of cutting down wood, because that is impossible. For if a man cut any quantity of wood one day, he cannot cut the same quantity again the next day. In the case of *Butler and Hedges* the *continuando* appeared to be void and insensible upon the face of the declaration, and therefore it shall be intended no damages were given for it; for the exception, that it is not a matter that lies in continuance, ought to be taken on the trial. And in such case the plaintiff ought not to be allowed to give in evidence more than one day's cutting of wood or the like. Trespass was brought for taking oysters *continuando*, which cannot be, and judgment was arrested.

Powell justice. A *continuando* is not to be supposed to mean a continuance without any intermission, for that would destroy all *continuandos*, for cattle cannot eat always. The (a) cutting of trees cannot be laid with a *continuando*. Nor would it lie here *continuando* the hunting and killing tenhares.

So

So no *continuando* for carrying away fifty loads of corn. Therefore in those cases the plaintiff (a) ought to lay the fact to be done between such a day and such a day; for else you (b) can have but the benefit of one trespass, and can recover damages only for one day's carrying, &c. where the thing does not lie in continuance. Why cannot hunting be continued as well as depasturing?

Holt chief justice. As to the case of an entry with *ouster*, it may be set forth specially in the count, or not; with a *continuando*, or *diversis diebus et vicibus* between such a day and such a day; but then you must prove that the plaintiff re-entered before the action brought, or else you cannot assign the mean trespass. (*Quod fuit concessum per Powell*) for by the *ouster* the defendant has got the plaintiff's possession, and he cannot be a trespasser to the plaintiff; but when the plaintiff re-enters, the possession is in him *ab initio*, and he shall have the *mesne* profits.

Powell justice. *Fitzberbert* says, that cutting of grafs may be laid with a *continuando*, and yet a man cannot cut always.

Afterwards, viz. the last day of the term, the court gave judgment for the plaintiff. And *Holt* chief justice said, that hunting might be laid with a *continuando* as well as consuming and spoiling the plaintiff's grafs.

Powell justice. It was so adjudg'd lately in the common pleas.

Holt. Cutting a quantity of wood cannot be with a *continuando*, but it ought to be laid, that *diversis diebus et vicibus* between such a day and such a day, &c. But in this case it may be well alledged *continuando*, and need not be laid *diversis diebus et vicibus*, &c. It is but a small trespass, which may be continued.

Powell. When you lay a *continuando* of a thing that does not lie in continuance, you can only give in evidence a trespass on one day, and can recover damages for no more: which *Holt* agreed.

(a) D. acc. ante 240, 324. Comb. 427. (b) D. acc. ante 240. Comb. 427.

MONCKTON
v.
PASHLEY.

In trespass for a local injury, if the plaintiff states that the defendant ousted him, he cannot recover for any distinct trespass after the ouster without proving that he re-entered.

Wyatt qui tam *vers.* Eyland.

IN an action on the statute of usury the *memorandum* was general of the first day of the term, but bail was not put in till the middle of the term; and the court gave leave to the plaintiff to enter up a special *memorandum*, for the defendant is not in court till bail filed. And this is only to make the entry according to the truth, which appears on record; and the court said, it was an amendment at the common law, and not on the statutes.

Vide 1 Will.
78. Str. 583.

Elderton's Case, the bailiff of Westminster.

S. C. 6 Mod. 73.

A justice need not mention in a warrant of commitment that he is a justice. S. C. Holt. 590.

But it must appear that he is one on the return to an *habeas corpus*. S. C. Holt. 590. Every act a justice does which he could not properly do otherwise than as justice shall be presumed to have been done by him as justice. S. C. Holt. 590.

3 Salk. 284. A palace retains its privileges, tho' the court and king remove wholly from it. S. C. Holt. 590. 3 Salk. 91. 284. Q. whether the commissioners of the board of green cloth can as justices commit a man to the porter of the verge, Vide Phillips's Regale Necessarium, cap. 3. 3.

HE was committed by the duke of Devon, and other commissioners of the board of *Green-cloth*, for executing a *fiari facias* within the palace of *Whitehall*, without leave of the board; and being brought up by *habeas corpus*, several exceptions were taken to the commitment and return. The commitment was for riotously and forcibly entering into a house within the palace of *Whitehall*, not having leave from the officers of the household. Mr. Mountague for the prisoners urged, that the warrant of commitment was insufficient; it is, "Whereas information has been made to this board, &c." Whereas the board of *Green-cloth* have no authority to commit persons for breach of the peace, or the like. Their business is to regulate the affairs of the family, and to punish the misdemeanors of the queen's menial servants; and though the warrant be signed by the commissioners, by their particular names, yet it cannot be intended to be a commitment made by them as they are justices of the peace. The statute of 28 Hen. 8. c. 12, creates *Whitehall* a palace, and therefore it shall have no larger privileges than that statute gives, wherein is a saving of the liberties of the old palace at *Westminster*; and when the queen does no longer live at *Whitehall* the privileges determine, and therefore this is no crime punishable by the board of *Green-cloth*. The queen's honour is as much concerned to see justice duly administered; as for the privileges of her own palace; and since the queen is removed from *Whitehall*, it ought to be as free as any other house in *King-street*. Officers may lawfully execute the queen's process there. If they would have this taken to be a commitment by the commissioners, as justices of the peace, they should have made it as such expressly. The commitment is, "and them to keep, till they shall find sureties to appear in her majesty's court of the verge, or till farther order from hence." But the court of the verge is not a proper court, nor has jurisdiction in this case; and the words, "till farther order," make the commitment illegal and void, for want of a proper conclusion.

Mr. Parker. The commitment is for riotously and forcibly entering without leave of the officers, &c. whereas they cannot give leave to commit a riot. Besides, the board of *Green-cloth* cannot punish persons for a breach of the peace. It ought to appear in the warrant, that they were justices of the peace, which it does not, but only in the return. It does not appear as it ought, what are the course of proceedings in this court of *Green-cloth*, and when they sit, and what is their authority.

Mr. attorney general for the queen. The authority of the persons committing need not appear in the warrant, nor ever does; but the subscribing of their names is sufficient. This court is not now to inquire into the nature and business of the court of *Green-cloth*. There are standing commissions for the peace, both for the verge and the palace, wherein the officers of the board of *Green-cloth* are always commissioners; and here they committed these persons as justices of the peace, for breach of the peace, for want of sureties, as every justice may do. It does not come now into consideration, whether an execution may be executed within the verge, though the palace ought to have such privilege. And to that purpose he cited *Jacob Hall's case*. 1 Vent. 169. 1 Mod. 176. 2 Keb. 846. but that matter does not appear in the return; but the commitment is for a riot, as by justices of the peace, and they may try this matter. The statute of Hen. 8. is only to ascertain the bounds of the palace of *Whitehall*, for the queen may declare any house a royal palace without the parliament. For it is the prerogative of the crown to give that privilege to any house the queen pleases. By the return it is set forth, that the persons committing were justices of the peace with the verge and palace, and the court will take notice of their power as justices. The words (without leave of the officers, &c.) do not make the offence less, but shew that the fact was done without any colour. A warrant of commitment need not be so certain as pleading, those who make it are gentlemen not understanding the forms of law; but in this warrant the offence, and their authority, sufficiently appear, and the conclusion of the warrant, "till they find sureties, or, farther order," is so of course, for when men are committed for want of sureties, they must stay in custody till they can find sureties.

Serjeant *Darnall* cited 3 Inst. 140, 141. and *Stamford's Pleas of the Crown*, ——— that formerly it was held a misprision, to cite or summon a man within the king's palace.

Mr. attorney general. This commitment is not by way of punishment, but only for safe custody till the matter is determined.

Mr. *Mountague*. Every commitment is a punishment; this commitment is to the porter of the verge, which is ill; for he is not a proper officer, to whom a justice can commit. They ought to direct their warrant to the constable, who is the officer appointed by the law.

Trinity Term 2 Annæ reginæ.

Holt chief justice. It need not be mentioned in the warrant, that they are justices, for they need not mention their office in the warrant; but it must appear in the return, and so it does here. The prisoners are charged with a riot, and should they not be tried? And those, who made the commitment, have an authority as justices within the verge and palace by particular commission, distinct from their authority as officers of the household. But it is not said in the return, that the queen is personally resident at *Whitehall*, which makes it a palace.

Mr. attorney general. After the king has once declared a house to be his palace, which is done by his declaration under his great seal, it continues a palace; although he remove afterwards.

Holt chief justice. Suppose a murder be committed at *Whitehall*, whilst the queen is resident at *Windsor*, can the murderer be tried before the lord high steward, and on the statute of 33 H. 8. c. 12. and that statute is only declaratory of the law?

Mr. Attorney. One *Jones* in the reign of queen *Elizabeth* was convicted of the murder of a man in the *Tower*, and though the queen was not resident there, judgment was given against him to be hanged, and to lose his right hand; and his hand was accordingly cut off before execution.

Holt chief justice. Here the parties are committed till they find sureties to appear at the court of verge, and it does not appear, that court has jurisdiction of the fact. We are indeed bound to take notice of every thing that belongs to the queen's privilege: that *Whitehall* is a palace, and that there is a court of verge, which was a court before the statute of *Hen. 8.* and has no stated times of sitting; it is held by virtue of an original authority in the high steward. The statute was read.

Powell justice. The privileges of the palace are by the common law in respect of the queen's presence, but that privilege does not determine so soon as ever she turns her back, when a house has been declared a palace. As a private man may have two mansion-houses, and live sometimes at the one, and sometimes at the other. I remember the case cited by Mr. Attorney, it is also mentioned in *Crompton*.

Holt chief justice. It is a new case, I will consider the statute. But I doubt of *Jones's* case. Shall a man have his hand

The king's bench takes notice of every thing relating to the queen's privilege.

hand cut off for the stroke first, and then be hanged for the murder? Shall the same act be a misprision and a murder too? When the offence amounts to felony, it drowns the misprision. If such a judgment was given, it was not considered. I should hardly agree to it.

ELDERTON'S
Case,

Felony drowns
a misprision.

Powys and *Gould* justices agreed with *Powell*, that the privilege of the palace remains, though the queen be not resident.

Holt chief justice. If the court be kept there, though the queen's person be not present, it is a residence; but when the queen, and the whole court, and all the officers, be removed, has it then the privilege of a palace? There is a difference between a total absence, and an absence for a time only.

Powell justice. Breaking of the exchequer has been held burglary, though none of the queen's servants resided there.

Holt chief justice. This matter was never stirred before, and I will use caution in it. It may be a contempt where the royal person is, because of the disturbance; as it would be in *Westminster-hall*, the court sitting; but it does not appear, in this case, the queen was resident.

Powell justice. A number of people without leave ought not to enter in a rude manner into the palace. We do not know the jurisdiction of the board of *Green-cloth*; but we must take notice of this commitment, as made by justices of the peace.

Holt chief justice. Surely the court of the verge has jurisdiction of riots, and it is not founded on the statute of *Hen. 8.* which *Powell* agreed.

Holt chief justice. It appears to be a commitment made by them as justices; for though they were sitting at the board of *Green-cloth*, yet having power to commit for this offence as justices, if they have not power as commissioners of the board, it must be taken to be done by virtue of the power they have, and not by colour of a power they have not; but their sitting there does not make them to be less justices surely.

Powell justice. The commitment to the porter may be only to take them into custody for a time.

Holt chief justice. He may have authority by warrant to take and carry them, but not to detain them in custody, as it is here; and the commitment is directed to him by name, as *janitori*. I will consider many things in this case.

Powell

ELDERTON'S
Case.

Powell justice. The commitment is well as justices by force of the power they have; but the exceptions, that the authority of the court of verge does not appear, and that the commitment is *janitori*, which is not a legal prison, are considerable.

But *per Holt*, we cannot send the prisoners back again, we must take care of them; but let them come up again by rule, without any alteration, and let things stay *in statu quo*. Adjourned.

But this matter never came before the court again, for the prisoners were discharged the next day.

Afterwards the last day of the term *Holt* said, I have searched for the case cited about killing a man in the *Tower*. It is *Burdelt* and *Muskett's* case. Being dissatisfied with my lord *Coke's* report of it, therefore I sent for the record, which is *Mich. 15 & 16 Eliz. rot. 2.* and there is judgment of death given, but no judgment that his right hand should be cut off. It is indeed so related in *Stowe's Chronicle*, and in fact his hand was cut off; but there was no judgment for it.

Jordan *vers.* Tompkins.

S. C. 6 Mod. 77

vide ante 841.

Indebitatus assumpsit, for that the plaintiff *ad requisitionem* of the defendant did provide meat, drink, and lodging for *J. S.* and *J. D.* and the plaintiff had judgment by default. Mr. *Acherley* moved in arrest of judgment, that an *indebitatus assumpsit* did not lie in this case, but the plaintiff ought to have declared specially.

But *per Holt* chief justice *et curiam*, it is well; for it is a contract between the plaintiff and defendant, and no (a) action lies against *J. S.* or *J. D.*

(a) Semb. acc.
ante 842. vide 2
T. R. 31.

Johnson *vers.* Shippen.

The master of a ship may in the course of his voyage hypothecate her for necessities even upon land. S. C. 6 Mod. 79. 11 Mod. 30. Salk. 35. Holt 48. R. acc. ante 152. and see the cases there cited. 3 T. R. 267. And may proceed against her in the admiralty upon such hypothecation. S. C. 6 Mod. 79. 11 Mod. 30. Salk. 35. Holt 48. R. acc. ante 152. 3 T. R. 267. But he cannot proceed against the owners there. S. C. Salk. 35. vide 6 Mod. 79. Holt 48. The master of a ship cannot as such sell the ship or any part of her. S. C. 11 Mod. 30. And if he makes a bill of sale of the ship in respect of something for which he might expressly have hypothecated it, the bill of sale will be void, and the ship shall be looked upon as hypothecated. Vide ante 806.

A Ship was outward bound to ——— and being in distress at sea in her voyage, put into *Boston* in *New England*; and there the master took up money, which he applied in necessities for the ship; and as a security for the repayment, by way of hypothecation, made a bill of sale to the party of part of the ship, who now libelled in the court of admiralty against the ship and owners, to compel

the master of a ship may in the course of his voyage hypothecate her for necessities even upon land. S. C. 6 Mod. 79. 11 Mod. 30. Salk. 35. Holt 48. R. acc. ante 152. and see the cases there cited. 3 T. R. 267. And may proceed against her in the admiralty upon such hypothecation. S. C. 6 Mod. 79. 11 Mod. 30. Salk. 35. Holt 48. R. acc. ante 152. 3 T. R. 267. But he cannot proceed against the owners there. S. C. Salk. 35. vide 6 Mod. 79. Holt 48. The master of a ship cannot as such sell the ship or any part of her. S. C. 11 Mod. 30. And if he makes a bill of sale of the ship in respect of something for which he might expressly have hypothecated it, the bill of sale will be void, and the ship shall be looked upon as hypothecated. Vide ante 806.

the payment of the money. Serjeant *Darnall* moved for a prohibition, and a day was given to hear counsel on both sides. On the day serjeant *Darnall* insisted, that as this case is, there ought to go a prohibition, because it appears upon the face of the libel, that this hypothecation was upon land in port, viz. at *Boston*, and not upon the sea, as it ought to be, to give that court a jurisdiction. Besides this appears to be a bill of sale of part of the ship, upon which the party may have his remedy at common law, and not a proper hypothecation. Also the proceedings are against the owners, as well as against the ship; and if the owners are liable, they are chargeable at common law.

Mr. *Chesbire* against the prohibition. It makes no difference, whether the hypothecation were upon the sea or upon land, being done in a voyage; and a prohibition has been denied upon the same point as this case, in this court between *Coffart* and *Lawdsley*, Trin. 1 Will. & Mar. Comb. 135. Holt 48. 3 Mod. 244. where the hypothecation was in port, viz. at *Rotterdam*. The same was adjudged here, Hil. 1696, between *Benoir* and *Jeffrys*, ante 152: and about a year since between *Justin* and *Ballam*, ante 805. a prohibition was granted, because it did not appear there was any hypothecation. In this case the necessity of the thing requires that it be done at land, and it would be prejudicial to navigation, if this suit in the admiralty should not be.

Holt chief justice. The case of *Coffart* and *Lawdsley* was the same as this, and there on a demurrer to a declaration in a prohibition, a consultation was awarded by the whole court. When an hypothecation is made either for money to buy necessaries, or for necessaries for the ship, in a voyage, the court of admiralty have a jurisdiction, for the party has no other remedy; we cannot give him any remedy against the ship; and if the suit there should not be allowed, the master will have no credit to take up necessaries for the use of the ship.

Powell justice of the same opinion. The original matter is consuable in that court, and the hypothecation upon land is of necessity; for it must be done in port, and cannot be done upon the sea, and the party has no remedy but by the maritime law.

Holt chief justice. No master of a ship can have credit abroad but upon the security by hypothecation, and shall we hinder the court of admiralty from giving remedy, when we can give none ourselves? It will be the greatest prejudice to trade that can be, to grant a prohibition in this case. Indeed if a ship be hypothecated here in *England* before the voyage begins, that (a) is not a matter within the jurisdiction of the court of admiralty, for it is a contract made here, and the owners can give security to perform the contract. Which *Powell* agreed.

(a) R. acc. ante 805. and see the cases there cited.

Holt

JOHNSON
v.
SHIPPEN.

Holt chief justice. There is no difference, whether the hypothecation be alleged in the libel to be made in port, or appears so to be by the suggestion, as it was in the case of *Coffart and Lowdell*. And as to what you say, that this is a bill of sale, and so a remedy at law, that is not so, for the master has no authority to sell any part of the ship; and his sale transfers no property, but he may hypothecate. And since the proceedings in the court of admiralty are against the owners, as well as against the ship; let a prohibition go *quoad* the proceedings against the owners, and let them go on to condemn the ship. To which the rest of the judges agreed.

Presgrave *vers.* Saunders.

In replevin the plea of property may be pleaded in bar.

Whether the property may be alleged to be in the defendant. S. C. Salk. 5. Holt. 562. 6 Mod. 81. or in a third person. S. C. Salk. 5. Holt 562. 6 Mod. 81. R. acc. Salk. 94. 2 Lev. 92. Carth. 243. D. acc. 2 Roll. Rep. 65. and ought to be so pleaded. sed vide Salk. 94. 2 Roll. Rep. 65. 3 Lev. 92. 3 Keb. 231. Carth. 244. 1 Show. 402. post 1017. 1249. And in either case the defendant shall have a return without an avowry. R. acc. Cro. Jac. 519. 2 Roll. Rep. 64. 2 Lev. 92. 3 Keb. 231. Salk. 94. Carth. 244. 1 Show. 402. ante 217. D. acc. 1 Vent. 249. 6 Mod. 103.

If the defendant pleads one plea to part of the charge in the declaration, and concludes with a verification, but prays no judgment, and then pleads as to the residue and prays judgment if the plaintiff ought to maintain his action *inde* against him, the prayer of judgment shall apply to both pleas.

IN replevin for taking several goods of the plaintiffs, *apud parochiam sancti Clementis Dacorum in comitatu Middlesexius prædicto*, in quodam loco ibidem vocato a chamber in *Doveries Court*, and the defendant pleaded, quod prædictus the plaintiff actionem suam prædictam inde *versus* eum habere seu manutenere non debet; quia dicit, quod, quoad prædictum anum lectum, &c. de bonis et catallis in narratione prædicta mentionatis parcellam, idem the defendant dicit, quod proprietatis bonorum et catallorum illorum est, et prædicto tempore captivus bonorum & catallorum illorum fuit, ipsi præfatis the defendant, absque hoc, quod proprietatis bonorum et catallorum illorum prædicto tempore quo, &c. fuit prædicto the plaintiff, prout per narrationem prædictam superius supponitur, et hoc paratus est verificare. Et quoad prædictum anum repositorium, et decem alios libros, &c. de bonis et catallis in narratione prædicta mentionatis residuum, prædictus the defendant dicit, quod tempore captivus bonorum et catallorum illorum residuorum ultimo mentionatorum proprietatis eorundem bonorum et catallorum fuit cuidam Ricardo Frith, absque hoc, quod proprietatis bonorum et catallorum illorum residuorum prædicto tempore quo, &c. fuit prædicto the plaintiff prout per narrationem prædictam superius supponitur, et hoc paratus est verificare et probare; unde petit judicium, si prædictus the plaintiff actionem suam prædictam inde *versus* eum habere, seu manutenere debeat, &c. petit etiam restitutum omnium et singulorum bonorum et catallorum prædictorum, uno cum damnis, &c. sibi adjudicari, &c. Upon a demurrer to the plea Mr. Ward objected, That it ought to have been pleaded in abatement, and not in bar. But it was held, that it ought to be pleaded in bar, and not in abatement; for it destroys the plaintiff's action utterly. And so is the case in 31 Hen. 6. 12. 39 Hen. 6. 35. and 2 Lev. 92. where it is said, that it was at the election of the

defend-

defendant, to plead it one way or the other; but the case was denied as to the election, for it was said, that it ought to be pleaded in bar and not otherwise.

PRESCRAVE
v.
SAUNDERS.

2. It was objected, that the conclusion of the plea went but to part of the matter, viz. the word *inde* referred only to that part of the plea, that alleged the property in *Frith*. *Sed non allocatur*, it goes to the whole. And it was held, that the defendant need not avow for a return in this case: and judgment for the defendant *per curiam*; and it is the same thing, where property is laid in a stranger, as in the defendant himself. *Ex relatione magistri Smith*.

Note, I took Mr. Ward's objection to be, that property in a stranger could not be pleaded in bar; but the court held it (a) might be pleaded, either in bar or abatement, as well as property, in himself; and it is all one to the plaintiff who has the property if he has none; and it has been so adjudged lately, though formerly it was held otherwise. *Pengelly*.

(a) R. acc.
Salk. 94. 2 Lev.
92.
D. acc. 2 Roll.
Rep. 65. Carth.
244. 1 Show.
402.

Salkeld, who was counsel with the defendant, agreed with Mr. *Pengelly*. And that which the court denied in *Levinz*, was the report of the case of *Wildman v. North*. For the plea was, property in the defendant, as it is reported in 1 *Ventr.* 249, and not property in a stranger, as *Levinz* reports.

Day ver. Muskett.

S. C. Salk. 640. 6 Mod. 80.

IN trespass, *quare vi et armis primo die Februarii, anno Domini millesimo septingentesimo primo, clausum suum fregit*, and concludes *contra pacem Dominae Annæ nunc reginae, &c.* The defendants plead that he and others did the trespass jointly, and plead a release to one of them. The plaintiff replies, *non est factum*. And the defendant demurs.

If trespass for an act in the reign of one king is stated to have been contra pacem of another it will be bad upon demurrer.

Mr. Ellis. The trespass being laid in the time of king William, for he died in March 1701, the conclusion *contra pacem* of the present queen, is ill, and a variance 22 Ed. 4. 24. p. 23. And it (a) was held in this court *Hil. 6 & 7 Will. & Mar.* between *Melwood and Lamb*, that it is not aided after a verdict.

But unobjectionable after verdict.

Mr. Coesbyre. Since the *copiatum pro fine* is taken away, it is not necessary to allege the trespass *contra pacem*.

Holt chief justice. No, it is the *vi et armis* may be omitted.

(b) *Sed vide ante* 38.

Mr.

DAY
MURKETT.

Mr. Chesbys. The defendant has confessed the trespass, and therefore he cannot take advantage of this mistake on a general demurrer, for it is only matter of form. If there had been no *contra pacem* at all, the declaration had not been ill in substance; and this being impossible and repugnant, it is as if there had been none. And so it is held 1 Sid. 253. that a wrong *contra pacem* is only form.

Mr. Ellis. That case differs from this, for there it was a trespass *continuanda per* five hundred years, and concludes *contra pacem domini regis nunc*, whereas it was in the reigns of several kings. But there it was right in effect, for the stating of the trespass brings it out of the former kings reigns, and makes it only a trespass in the reign of the last king, and so *contra pacem domini regis nunc* was well.

Holt chief justice. This conclusion is ill, and inconsistent with the trespass alleged, for we must take notice of the demise of the king, which was *nono Martii*, and the trespass is laid *primo Februarii*, which was before his demise. So that there is a fault in the description of the trespass, which is matter of substance, and not of form only; (that) if the *contra pacem* had been (a) omitted, it had been only matter of form. But here it is repugnant, and it cannot be merely void, because it is a part of the description of the trespass. And upon this declaration you cannot give in evidence a trespass *contra pacem* of the late king. But this would be aided after a verdict by the Statute of Charles II.

Powell justice. It is ill and inconsistent, and though in trespass you may give in evidence a trespass on another day than is alleged in your count, yet there must not appear a repugnancy in your declaration as here. Whereupon Mr. Chesbys prayed leave to discontinue, which the court granted upon payment of costs.

Nash *versus* Battersby.

S. C. 6 Mod. 80.

IN debt upon a bond, the plaintiff declares by the name of Edward Nash *generosi*. The defendant pleads in abatement, that the plaintiff is no gentleman. To which the plaintiff demurred, which is ill; for it amounts to a confession, that he is no gentleman, and then not the same person named in the count: but he should have replied, that he is a gentleman. Judgment (b) was given, that the writ should abate.

(b) According to 6 Mod. 80. the court awarded a respondent ouster, because the plea was pleaded after a general imparlance.

(a) Vide ante
38. 4 Ann. c.
26. f. 1.

Comes Banbury *vers.* Wood.

S. C. 6 Mod. 84. Salk. 5. 3 Salk. 20.

IN a writ *de homine replegiando*, the defendant appeared and pleaded in abatement of the writ, that the writ does not set forth of what ville, hamlet, or place, the defendant is. It is, *quod replegiari facias A. B. quem Johannes Wood mercator, &c.* without any addition of his abode. The plaintiff demurred; Serjeant Hall for the plaintiff. No addition is necessary in this case, because no *exigent* lies here. In actions of trespass *vi et armis*, process of *exigent* did lie at the common law; but the writ *de homine replegiando* is not *vi et armis*, and so no process of outlawry lay in it at common law, nor is such process given on this writ by any statute. If by any statute, it would be by the statute of 25 *Edw. 3. c. 17.* but that does not extend to it; for it is, that process of *exigent* shall be awarded in actions of detinue of chattels, and taking of beasts. In this case there shall be no fine to the king. The statute of *Edw. 3.* does not extend to give process of outlawry in a writ of entry upon the statute *ubi ingressus non datur per legem.* 35 *Hen. 6. b.*

In a *homine replegiando*, the defendant's addition need not be mentioned.

The defendant's addition need not be mentioned in any original which is vicontiel.

A *homine replegiando* is vicontiel. D. acc. ante 903.

Mr. Beresford for the defendant. This writ is within the statute of additions. 1 *Hen. 5. c. 5.* for on this writ process of *exigent* shall be awarded. Process of outlawry lay at common law, as well in such actions, where *vi et armis* might be supposed, as where it was alledged 35 *Hen. 6. 6. 2 Roll. 805. n. 1 C. L. 128. b. Plowd. 228. b. F. N. B. 220. b.* as in a writ of deceit, which is in nature of trespass. 11 *Hen. 4. 15.* a *capias* awarded in *homine replegiando*. So process of *exigent* lies in a replevin of goods.

Where the defendant's addition is not mentioned in the original, it cannot be mentioned in the alias or pluries.

The first day this case was debated, Holt chief justice said, the statute of *Hen. 5. c. 5.* requires there should be additions in all original writs, wherein process of *exigent* lies, but that must be understood, where the proceedings are upon the first writ; but where the proceedings are upon the subsequent process, as in a replevin *de averiis*, where the proceedings are upon the *pluries replevin*, that is out of the statute.

Powell justice. It seems to me to be all one.

Holt chief justice. In actions *vi et armis*, process of outlawry lay at the common law. But in actions on the case, where no *capias* lay, but distress infinite, process of outlawry was given by the statute, and did not lie at the common law. But in this case the process is not distress infinite, but a *capias*, and this is an extraordinary writ. It is a trespass, and here the king shall have a fine. In replevin

BANBURY
WOOD,

of goods process of *exigent* does not lie on the original writ, but when on the return of a *nulla bona* on the *pluries replevin*, a *capias in withernam* issues. At the common law there needed no addition in any case. If an *exigent* lies upon the *pluries* returned in this case by the common law or statute, then there must be an addition. Indeed the statute of *Edw. 3.* gave an *exigent* in a replevin of goods, and it lay not at common law, because there are no proceedings upon the first writ, which is *vicontiel*, but upon the *pluries* returned a *capias in withernam* issues. But in this case the process issues upon the original writ returned.

Powell justice. I see no difference.

Holt chief justice. Surely the statute of *Hen. 5.* extends to this case, for process of outlawry did not lie in a replevin *de averiis* at common law. Pray see what is the process in a *homine replegiando* for it is an original writ, and the defendant is to appear upon the return.

Afterwards the last day of the term, *Holt* chief justice said, we are all agreed, that no addition is necessary in this case, because the *pluries replevin*, upon which we hold plea, is not the original writ, but the original writ is *vicontiel*, and no process of outlawry lies upon it, and therefore it is not within the statute. And since there is no addition in the first writ, there must be none in the *pluries*, because the *pluries* must pursue the first writ, or else it will be a variance. The *pluries* is not the original writ, but is founded on another, *viz.* the first. The statute of *Hen. 5.* is to be taken strictly, and not by equity. The words are: that in every original writ of actions personal, and in which the *exigent* shall be awarded, &c. Now, in an assize of *novel disseisin*, if it be found to be with force, upon which the king has a fine, and a *capiatur* is entred, and process of outlawry lies, yet that is not within the statute of *Hen. 5.* because it is a mixt action, and not merely a personal action.

The defendant's addition need not be mentioned in an assize of *novel disseisin* found to have been with force.

Powell justice. We do not hold plea upon the first original writ. You never saw a writ *de homine replegiando* with an addition.

Holt chief justice. If the first process be without any addition, and the *pluries* is made with an addition, then it varies from the first, and that will be a fault, it will make it naught. The second and third writs are founded on the first, and although you can have no *oyer* here (as was objected by *Mr. King*) of the first, or second writ, yet that is not material. Let the defendant answer over.

MR. *Richardson* prayed a *mandamus* to the master and wardens of the company of gun-makers, to cause them to give a proof-mark to *J. S.* a freeman of the company, without which he cannot sell his guns; for neither the queen, nor other persons will buy any guns, which have not that mark. *Holt* chief justice. We cannot do it. They are no legal establishment. You must petition the queen to issue a *quo warranto* against them, to repeal their charter for this misdemeanor; but we cannot help you. Deny the *mandamus*, *per totam curiam*.

A *mandamus* does not lie to compel a trading company to give one of the members a recommendatory mark, without which he will not be able to carry on his trade with effect.

IN debt upon a bond with condition to perform an award so as the said award be made in writing, and ready to be delivered to the parties, &c. the plaintiff in setting out the award in his replication, upon *nul agard suit* pleaded, shewed it was made in writing, but did not say it was ready to be delivered, &c. And upon demurrer it was held by *Holt*, and the court, that it was well enough; for being made in writing, it is ready to be delivered.

R. acc. 6 Mod. 82. which is perhaps S. C. ante 115. 247. Cro. Car. 389. 1 Show. 98. 242. Carth. 158. 3 Mod. 330. Hardr. 399.

Regina vers. Nash.

Conviction post vol. 3. p. 26.

NASH was convicted before the justices upon the late statute, 3 W. & M. c. 10. for deer-stealing, and the justices issued their warrant thereon to the constable to levy the penalty, who accordingly distrained the goods of *Nash*; but before any sale of the goods, a *certiorari* was brought to remove the conviction into this court, where it was affirmed. After the *certiorari* brought, the constable sold the goods, and levied the money, but refuses to pay over to the prosecutor according to the statute. And now Mr. *Broderick* prayed a *mandamus*, to compel him to pay the money, for that the constable having made no return of his warrant, the party has no other remedy.

If a constable seizes goods under a warrant upon conviction of justices and the conviction is removed into B. R. and affirmed, and then the goods are sold, a *mandamus* does not lie to compel the constable to pay over to the prosecutor any part of the money levied. Nor can B. R. compel him to return his warrant, S. C. Salk. 147. But the justices may. S. C. Salk. 147.

Mr. *Montague* and Mr. *Eyre* opposed it, and insisted that no *mandamus* lies in this case, for here is no return to charge him, and the prosecutor has proper remedy by action, as for money received to his use.

Mr. *Broderick*. He ought not to be allowed to take advantage of his own wrong, and we have no other remedy for want of proof.

REGINA
v.
NASH.

Holt chief justice. It was doubtful upon the words of the statute, whether the constable had power to sell the distress, but we have determined it that he may. Now in this case the conviction being removed before us by the *certiorari*, the prosecutor cannot resort to the justices.

Powell justice. Cannot we make a rule for him to return his warrant?

Holt chief justice. No, we cannot, for it is an authority executed before the *certiorari* awarded, and we have no conulance of the warrant, no more than of an execution executed on a judgment in the common pleas before a writ of error brought in this court. The prosecutor should have kept a copy of the warrant that was delivered to the constable, and that would have been evidence against him on an action. But this warrant being returned before the justices, they may call upon and require the constable to make a return of his warrant. For the goods being distrained before the *certiorari* awarded, although they were not sold till after, yet execution being executed in part before the writ issued, it does not stop the execution of the residue, but the justices may proceed against the constable, and this is your proper remedy. As when a *feri facias* is sued on a judgment given in the common pleas, and the defendant's goods seized thereon, and then a writ of error is brought in this court, yet (a) notwithstanding the common pleas may award a *venditioni exponas*, upon a return by the sheriff, that the goods remain in his hands *pro deservitu emptorum*: we will not strain these things. Take your remedy from the justices, who have a coercive power to make the constable return his warrant, and may set a fine upon him, if he does not; and we can do no more to a sheriff for not returning an execution. We cannot make laws.

Powell of the same opinion.

Holt chief justice. If we should grant a *mandamus*, and the constable refuse to comply with the command of the writ, all we can do is to fine him, and it is a round about way. You may indict him, or proceed against him by way of information; or the justices may fine him high enough to compel him to pay the money.

Let the rule for a *mandamus nisi*, &c. be discharged, *per curiam*.

If goods are once levied under a conviction, a *certiorari* to remove the conviction will not suspend their sale.

(a) Acc. Yelv. 6.
1 Vent. 255.

POWELL justice. Barren inclosed, which is within the meaning of the statute of 2 & 3 Edw. 6. c. 13. s. 5. 6. to be exempted from payment of tithes, must be such land as is barren *suapte natura*, and not land upon which wood or the like grew before, which is afterwards burnt, and the land converted into tillage. And on a suggestion for a prohibition to a suit for tithes of such land, it must be alleged to be barren *suapte natura*.

Land is not to be exempted from tithes because it is barren, unless it is naturally barren. R. acc. Bunb. 159. Semb. acc. 2 Inst. 656. vide Burn.

Tithes III. 5. 1st Ed. vol. 2. p. 377.

A Man was indicted for assaulting and beating a custom-house officer in the execution of his office. Mr. Lutwyche moved to quash it, because the statute of the 13 & 14 Car. 2. c. 11. s. 6. inflicts a penalty, and prescribes the particular method of punishing that offence, viz. by the justices of peace, by fine and imprisonment; and therefore no indictment lies for this offence, as was adjudged about two years ago in the case of *The King v. Watson*, in this court, and resolved accordingly by all the judges at *Serjeants-Inn*. The indictment was quashed, *absente Holt*.

R. acc. ante 347. and see the books there cited.

HOLT chief justice. It was formerly held by all the judges of *England*, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles; but the law is otherwise, for in such cases, if they refuse to give a copy of the articles, a prohibition shall go *quousque* they deliver it, and accordingly upon motion a prohibition was granted in the like case *per Holt et curiam*.

In a suit in spiritual court *ex officio* the party is intitled to have a copy of the articles. Vide 2 H. 5. f. 1. c. 3.

Thorneton *vers.* Bernard.

IN trespass for taking *duas sarcinas lini*, *Anglice* two packs of flax, *et duas sarcinas cannabi*, *Anglice* two packs of hemp, after a verdict, Mr. Attorney General moved in arrest of judgment, that this was uncertain, not setting out the weight or quantity of a pack or bundle.

No objection can be taken after verdict to a count in trespass for taking two packs of flax, and two

packs of hemp, on account of the uncertainty.

Mr. Braderrick. There have been stronger cases than this after a verdict, as in *trover* for *duobus peciis vini branditi*, *Anglice* two pieces of brandy, was (a) held good here.

Holt chief justice. It is well enough. You may plead the recovery in this action in bar to any other action brought for the same thing; and if the plaintiff should declare of the taking

Vide ante 20, 133, 191, 589. and the books there cited. post 1529.

(a) Vide ante 191.

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so much hemp by weight, you may aver that these packs and bundles contained that weight. In an action of detinue you declare for a box of writings, without setting forth any writing in particular; but if you set forth a particular writing, which concerns land, as a charter of feoffment, then indeed the defendant shall not be allowed to wage his law.

Let the plaintiff take his judgment, *per curiam*.

Garland *vers.* Exton.

S. C. Salk. 194. 6 Mod. 33.

A defendant is not intitled to costs on a judgment in abatement. R. acc. ante 336. vide ante 788.

THE defendant pleaded a plea in abatement, and the plaintiff demurred, and judgment was given for the defendant, and Mr. *Brantwaite* moved for the defendant, that he might have his costs, upon the late statute, 8 & 9 W. 3. c. 11. s. 2.

Mr. *Raymond* for the plaintiff insisted, that it had been otherwise ruled in this court lately in two cases, *viz.* *Tomms v. Lloyd*, ante 336. and *Ogle v. Norcliff*.

Holt chief justice. The defendant ought not to have costs by the statute, for judgment in this case is not given on the demurrer, but *quod querens nil capiat per billam*. The statute intends only to give costs, where the merits of the cause are determined on the demurrer. Where judgment is given for the plaintiff, it (a) is not final, but only a *respondeas ouster*, and he has no costs by the statute, and therefore it ought to have the same exposition as to the defendant, that he have no costs neither; and the like construction ought to be in both cases; to which the court agreed.

(a) Vide ante 594.

Brough *vers.* Parkings.

S. C. 6 Mod. 80.

A neglect to protest an inland bill of exchange will in no case preclude the holder from maintaining an action upon it. S. C. Salk. 131. 3 Salk. 69. Holt 121. vide Bayley 40, 41. The court will take notice judicially of the day on which any feast ascertained by the calendar falls. R. acc. Salk. 626. Semb. acc. 6 Mod. 41. Co. Lit.

ERROR upon a judgment in the common pleas, in an action on the case upon an inland bill of exchange brought against the drawer. The plaintiff had judgment by *nil dicit*. Mr. *Raymond* for the plaintiff in error urged, that it does not appear in the declaration, that the bill was protested, and since the late statute of 9 & 10 W. 3. c. 17, no action can be brought against the drawer, unless there be a protest made, as the act requires, which ought to be set forth in the declaration. At the common law the plaintiff had no remedy against the drawer without notice given him of the non payment by the party on whom the bill was drawn, and unless this statute makes a protest necessary

before

before any action can be maintained against the drawer, it does nothing, and the party had the same advantage before the act as since.

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Mr. *Parker* for the defendant in error insisted, that the declaration was sufficient, because this bill is not within the statute; for it does not appear, that the bill was accepted by the underwriting of the person on whom it was drawn, as the act requires; and there can be no protest without such subscription, and for that reason he said, the merchants now refuse to underwrite an acceptance. But if this bill be within the statute, yet the protest need not be set forth in the count, because the protest is intended for the benefit of the drawer; for no body else can be damaged for want of notice, and if he receive damage for want of such protest, if the damage amount to the value of the bill, that will be a discharge of the action; or if it be less, then the drawer ought to have as much as it amounts to. But this must be taken advantage of either upon the evidence, or by a special verdict, whereby it may appear to the court, which cannot be in this case.

Holt chief justice. In this case, as well as upon a foreign bill of exchange, the plaintiff must give convenient notice to the drawer, of the non-payment of the bill; for if the drawer receive prejudice by the plaintiff's delay, the plaintiff shall not recover. A protest on a foreign bill is part of the custom, but on an inland bill no protest was necessary by the common law, but by this statute. But this statute does not destroy, or take away the party's action, where there is no protest, nor is the want of a protest any bar of the action, but the act seems only to take away from the plaintiff his interest or damages, where he has not made a protest, or to give the drawer a remedy against him by way of action for the costs and damages. 9 & 10 W. 3.

Powell justice of the same opinion. I cannot agree to take away a man's right by ambiguous words in an act of parliament, they must be express words, which take away a man's actions. I believe a protest was never set forth in any declaration since this statute: which *Holt* agreed.

Another exception was taken to the execution of the writ of inquiry. The writ is returned such a day in *quindena Martini* and the inquisition returned is, *virtute brevis*, &c. returned in *quindena Martini ultimo præterito*, which must be a year before, viz. *Martinmas* twelvemonth; and *St. Martin's* day is a fixed feast, and always on the 11th of November.

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Holt chief justice. The return is made on the 28th of November, which is the last day in full term.

Mr. Parker. You cannot take notice of the day of the month.

Holt chief justice. We take notice of all feasts, and the almanack is part of the common law, the calendar being established by act of parliament, and it is published before the common prayer-book. Let the judgment be affirmed.

Intr. Hil. 13
W. 3. Rot. 380.

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S. C. 6 Mod. 63.

Under a custom to grant copyholds to two or three for their lives and the life of the survivor, to hold separately in succession, and non aliter, the lord may grant to one and his assigns to hold for the lives of three persons and the life of the survivor, notwithstanding he may be intitled by the custom of the manor to an heriot on the death of every such person successively dying seised. S. C. Salk. 188. 3 Salk. 181. Holt 163.

And he shall have a heriot on the death of any assignee who may die seised. S. C. Salk. 188. 3 Salk. 181. Holt 163.

No interest can be obtained by occupancy in a copyhold estate. S. C. Salk. 188. 3 Salk. 181.

Holt 163. D. acc. Co. Lit. 41. b. 33th Ed. n. 3. If a special verdict finds a grant for life, the grantee shall prima facie be presumed to be alive at the time of the verdict. Vide G. m. Dig. Pleader, C. 67. 2d. Ed. vol. 5. p. 51.

IN ejectment upon the demise of Jonathan bishop of Exon the jury find, that the lands in question are customary tenements, parcel of the manor of Tregear in the county of Cornwall, and by the custom of the manor are demisable by copy of court-roll to two or three persons for term of their lives, and of the longest liver of them, *habendum successive sicut nominantur in charta, &c. et non aliter*; and that by the custom of the manor, the person first named in the grant enjoys the tenements to him alone during his life, and so the second and third: that by the custom of the manor the lord is to have heriot of every such person successively dying seised; that one Edward Nosworthy, being lord of the manor by virtue of a demise made thereof to him by Thomas late bishop of Exon, immediate predecessor to the lessor of the plaintiff, did by copy of court-roll grant the tenements in question to one Thomas Norton, and his assigns, *habendum* to him and his assigns for the lives of John Penhallow, William Walton, and of the said Thomas Norton, and of the longer liver of them *successive, &c.* that Edward Nosworthy died, whereby his estate determined; that Jonathan bishop of Exon, the lessor of the plaintiff, entred into the manor, and was seised *jure ecclesiae*, and entred upon the tenements in question, *tunc in possessione* of the said John Penhallow the defendant *colore prædictæ concessionis per dictam copiam rotulorum curiæ manerii prædicti per præfatum Edwardum Nosworthy existentia*, and ejected him, and made a lease to the plaintiff, &c. and concludes *super tota materia*, if the defendant is guilty of the said trespass and ejectment, &c. Serjeant Hooper and Mr. Eyre for the plaintiff insisted, that this grant made to Thomas Norton for his own life, and the lives of the defendant and William Walton, is void *in toto*, not being pursuant to the custom. The custom is found to be, to make grants to two or three persons for their lives, *habendum succes-*

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fur, &c. et non aliter; but the grant by *Edward Nefworthy* is to *Thomas Norton* and his assigns, *habendum* for his own life, and the lives of *J. P.* and *W. W.* which varies from the custom. And though the grant be of an inferior interest than is allowed by the custom, yet it being prejudicial to the lord in respect of his tenure, and of his services, &c. the custom will not warrant it, but it will be void against the successor. In this case *Thomas Norton* is tenant for his own life, and the lives of the other two; for *J. P.* and *W. W.* are not named to take any interest, but only added by way of limitation of estate to *T. N.* so that upon the death of *T. N.* if either of the other two lives be in being, there will be an occupant of the copyhold, which will be an injury to the lord, when a stranger shall have power to come in without his consent. Where an estate *pur auter vie* is made of copyhold lands, an occupancy is incident to it, as well as to an estate *pur auter vie* in freehold lands. If upon such a grant the tenant *pur auter vie* should become a bankrupt, the commissioners by force of the statute might assign over his estate, and such assignee will hold the land after the death of the tenant during the lives of the *cestuys que vies*; for the lord cannot enter against his own grant so long as either of them live, which will be an inconvenience and an injury to the successor. Besides, this grant, if it be made good, will enure to the prejudice of the lord, by depriving him of his heriot custom; and in this country heriots are very valuable, and a great part of the revenue. For the custom has confined the payment of the heriot to a particular estate, *viz.* upon the death of every tenant dying seised. Now in this case if either of the *cestuys que vies* die before *T. N.* the lord will lose his heriot, which he would be intitled to, if the custom was pursued by the grant; because they are not tenants, and so not within the custom. And if *T. N.* die first the lord cannot claim a heriot, because he is not the person to pay it, not being first named to take by the grant. Now though a lesser estate may be included within a power by custom to make a greater estate, as by force of a custom to grant for three lives, the lord may grant for one life; yet the full rents and services must be reserved, or else the grant will be void. If a man have a power to make leases for three lives, he cannot make a lease for a thousand years, which yet is a less estate in the eye of the law; because the law considers the value of the estate, and does not merely regard it as a less estate in quantity in the eye of the law. So if a man have a power to make leases for three lives, reserving the ancient rents and services, a grant for three lives without any reservation, or with a reservation made in such a manner as that it will be impossible the rent should ever become payable, will be void. In the case of the dean and chapter of *Warcester*, 6 Co. 37. and 2 Cro. 76. it is implied in the resolution, that

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if the statute of 13 *Eliz.* had required the reservation of accidental services, the loss of the heriot would have made the lease void. And in the principal case the loss of the heriot differs it from the case of *Venn and Howell*, 1 *Roll.* 511. which is objected, where there was no heriot custom. But admitting this to be a good grant as to *Thomas Norton* for his own life, yet being void as to the limitation for the lives of the other two, it must be void in the whole, and cannot stand good for part, because the lord grants in a manner under a power by force of the custom, which being exceeded, must be intirely void against the successor as in other like cases. For howsoever the power be given, whether by act of parliament, by grant, or by custom, all will come under the same construction, and when it is exceeded, the estate made is wholly void. As if a bishop make a lease for thirty years, or but two and twenty years, it will be void against the successor in the whole, and cannot stand good for one and twenty years, because the estate is intire, and cannot be severed. So a lease *parol* made for four years is void for the whole, by the statute of 29 *Car.* 2. of frauds. So powers under settlements must be strictly pursued, when the words are particular, according to the distinction in *Whitlock's case*, 8 *Co.* 69. b. 70.

Next they took several exceptions to the verdict. 1. That although where a custom warrants a greater estate a lesser is included, yet when the jury only find the custom to make the greater estate, as here, that will not warrant the making a lesser estate; for that is only by inference, and argumentative: but the jury here ought to have found positively, that by the custom an estate *pur auter vie* is grantable. As in 2 *Roll.* 693. n. 1, 2. *Venn and Howell*. But as this custom is found, the grant here is not within it, for it is, that the lords may make estates to two or three persons for two or three lives, *et non aliter*, which expressly excludes an estate *pur auter vie*. 2. By the verdict it does not appear, that the estate granted is yet continuing, for the jury have not found that *Thomas Norton* the tenant *pur auter vie* is alive, and then the court must presume that he is dead (as indeed the truth is) as in an action brought by one that claims under a lease made by tenant for life, he must aver the tenant for life is living. 2 *Cro.* 622. 2 *Bulstr.* 263. Indeed where the jury make a special conclusion to a particular point as in *Goodall's case*, 5 *Co.* all other things shall be intended; but here the verdict concludes generally upon the whole matter, if the defendant be guilty, &c. And by the words *John Penhallow* may as well be supposed to be in possession as an occupant, as under the interest granted to *Thomas Norton*; for it is, that the plaintiff entered into the land, *tunc in possessione prædicti Johannis Penhallow*.

hallow colore prædictæ concessionis, &c. per præfatum Edwardum Nofworthy existen. So that here is no title found for the defendant, and the plaintiff is found to be in possession.

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Mr. Williams and Mr. Mountague for the defendant argued, that this grant is warranted by the custom for the whole estate granted; for a grant to three for the lives of three others, is a lesser estate in judgment of law than a grant to three for their own lives, and therefore must be included within the custom by necessary implication. It must be intended, that when a grant is made to three for their own lives, the grantees may surrender and compel the lord to admit them; and he that comes in by such surrender, will have an estate *pur autre vie*; and if the tenant by this act can make such an estate, surely the lord may, or else it will be in the power of the tenant to alter the custom, and not of the lord, which is not equal. But in this case the lord does not grant merely by a nude authority, but he has an authority coupled with an interest, and therefore is not tied up to the letter of the custom; but a grant within the reason and equity of the custom is good. *Co. Lit. 52. b.* as in the case of *Downs and Hopkins*, 1 *Cro. Eliz.* 323. where the custom was to make grants for one or two lives; and a grant was made to a man and his wife, *habendum* to the husband for life, and to the wife *durante viduitate sua*; this was adjudged a good grant, within the custom, which warranted a greater estate. So the case of *Stanton v. Barnes*, 1 *Cro. Eliz.* 373. where the custom was, that the lord might demise *solummodo* in fee, yet it was resolved he might demise for years, or life, or in tail, being lesser estates, and the word *solummodo* should not restrain his liberty. 1 *Roll.* 511. n. 1, 2. *Coke's Copyholder* 155. *Co. Lit. 52. b.* So in our case the grant to T. N. for his own life, and the lives of J. P. and W. W. is a lesser estate in the eye of the law, than if it had been granted according to the letter of the custom, to three persons *successive* for their own lives; and in substance and effect the custom is pursued, for the grant is for three lives, and in both cases the continuance of the estate is the same. The meaning of the custom and of the words, *et non aliter*, is, that the lord shall not grant a larger estate than for three lives, nor a joint estate, but *habendum successive*; so that they restrain the lord as to the quantity and quality of the estate granted. If the lord grant to three persons for their lives without the words *habendum successive*, the grantees would be jointenants. *Co. Copyholder* 139. And such grant would be void, because not pursuant to the custom, but excluded by the words *et non aliter*. But it is the same thing to the lord, whether the persons named take it severally for their lives, or that one of them take the whole estate for their three lives; and it will be no inconvenience or prejudice to the lord, for he will come to

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to the land again as soon. Nay, in the principal case he will have it sooner, for if *Thomas Norton* die first, living the other *cestuys que vias*, the lord shall enter, and there shall be no occupant, because of the prejudice it would be to the lord, as is adjudged 1 Roll. 511. n. 3. *Venn and Howell*, which is our case in point. And for the same reason the statute of frauds, 29 Car. 2. does not extend to make estates *pur auter vie* in copyhold lands *assets* or devisable. And though a copyholder *pur auter vie* should become a bankrupt, the assignee of the commissioners of bankrupts must be subject to the same fine, rents and services, as all other tenants. And in the principal case the lord will not lose his heriot, for when *Thomas Norton* dies, the heriot becomes due. And in like manner a heriot must be paid upon the death of every assignee of the commissioners of bankrupts; but if *J. P.* or *W. W.* these *cestuys que vias*, die during the life of *T. N.* then indeed the lord will have no heriot, nor is he intitled to any by the custom; and it would be the same, if they two took the estate after the death of *T. N.* by the grant, for no heriot is due on their deaths, because they were not in possession, as the custom is. But admitting a grant to a man for his own life and the lives of two others is not warranted by the custom, yet a grant to a man for his own life only, which is a lesser estate than an estate to three for their lives must be good upon the reasons and authorities before alleged; and then though this grant be void as to the limitation for the lives of *J. P.* and *W. W.* yet it will stand good to *T. N.* for his own life, for the former part of the grant is sufficient to pass an estate for life to *T. N.* and then the *habendum*, if it be beyond the power, will be surplusage and void, and the grant will stand good. The *habendum* is a distinct thing from the grant, *Hob. 171.* though there is a difference, where the estate is granted by express words in the premises, and where it is only implied. Indeed where tenant in fee makes a grant, the implied estate in the premises may be either restrained or increased by the *habendum*; but in this case the *habendum* can neither increase or destroy the implied estate. In copyhold lands there is no legal estate for life, it is only an estate at will established by the custom, and the lords are only compellable in equity to make admittances. And grants of copyhold estates shall be construed by equity, as 2 Roll. 67. *Brookes v. Brookes*, *Poph. 125. 126.* If the lord had only a naked power to make leases for three lives, yet a grant for one life would be good. *Co. Lit. 258. a. b. Perkins, fol. 189.* A grant to a man for his own life, remainder to him for the lives of *J. S.* and *J. D.* though it be void as to the remainder, yet it will be good as to the estate for life; and here, though *T. N.* is last named in the *habendum*, yet it shall be transposed in construction, as if it were first limited.

As to the exceptions taken to the verdict, it was said, that since the grant is found to be made to *T. N.* for his life, it must be supposed that he is still living, and the jury have not found any title in the lessor of the plaintiff.

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The court were all of opinion to give judgment for the defendant upon the first argument in *Trinity* term; but upon the importunity of serjeant *Hooper* they gave him leave to speak to it again this term, when judgment was given for the defendant by the whole court.

Upon the first argument *Holt* chief justice said, this matter might have been better found; but though it be not found, that *T. N.* is living yet when the jury find a grant to him for his life, we must intend in a special verdict, that he still continues alive, especially when the plaintiff is to make out a title to avoid the grant: but it (a) would be otherwise in a plea. *Quod fuit concessum per Powell* justice. We cannot presume that he is dead, for he being once found alive, we must take him so to continue, unless it were expressly found, that he is since dead.

Holt chief justice. There is no difference in this case as to the estate of the lord, who made this grant; for a lord that is seised in fee of the manor can make no greater estate of any copyhold than for three lives, according to the custom. Surely a grant for one life is good within this custom; as where the custom is to grant in fee-simple, the lord may grant in fee-tail without dispute. If the restrained finding of the jury were to be taken as the plaintiff's counsel insist, if the lord grant only for one life, it will be void; but the words *et non aliter* must be meant only of the extent of the custom, and not that the lord is confined to the formality of a grant for three lives only. The custom, that the grantees shall take *sicut nominantur in charta*, is good. When a grant is made to one named in the premises, *habendum* to him and his assigns, during his own life and the lives of two others, the two *cestuys qui vias* may take in remainder by custom, though named after the *habendum* but the custom is not so found here. But by the custom of some manors, he that is first named may by surrender defeat the estates of those in remainder; but the custom shall be confined to that particular form of surrender in court, and shall not be extended to a surrender in law by fine, as was adjudged in this court, between *Zinzan* and *Talmage*, *tempore Car. 2.* (*quod vide T. Jones* 142, 143.) Surely in this case the grant will be good to *T. N.* for his own life, being an estate within the limits of the custom, and the naming of the other two lives will not diminish his estate. As for the case put upon

Custom to grant
for three lives,
a grant for one
is good.

(a) R. acc. Dal. 101. pl. 34. 1 Mod. 216. 2 Mod. 93. D. acc. Plowd. 31. 2. Moor. 306, 335. Co. Litt. 41. a. 303. b. Vide 2 Lev. 210. Com. Dig. Pleader C. 66. 2d Ed. vol. 5. p. 50.

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If a copyholder
for life commit
a forfeiture, the
lord shall enter,
and not the re-
mainder man.

the statute of *Elizabeth*, where a lease is made by a bishop for two and twenty years, it shall be void in the whole, and shall not be good against the successor for one and twenty years, because the statute ties it up to that form. But if the words of the statute were, that they might make leases for any number of years not exceeding twenty-one years, if a lease were made for two and twenty years, it would stand good for the one and twenty years. It is very plain, that if a grant be made of a copyhold *pur auter vie*, that upon the death of tenant for life living *cestuy qui vie* there shall be no occupant, but the (a) lord shall enter. As when there is a tenant for life of a copyhold, the remainder for life, and tenant for life commits a forfeiture, the lord shall enter, and not he in the remainder. In this case the estate granted is a lesser estate than a grant to three for their lives, which the custom admits. I do not see how the lord will be prejudiced by this grant, by the loss of his heriot, as is insisted; for by the custom a heriot is due upon the death of every tenant dying seised: so that although the lease be made *pur auter vie*, yet upon the death of *T. N.* the tenant for life, a heriot will become due, and the custom extends to it.

Powell justice. A grant to one for life, *habendum* to him and two others for their lives, is good within the custom. Without doubt there can be no occupant in this case, for the estate goes no farther than the custom. If by the custom the lord may grant for three lives, he may grant for one life, or for any estate coming within the intent of the custom; then the grant here will be good to *T. N.* for his own life, though it should be void as to the limitation for the lives of the other two. The heriot will be due upon the death of *T. N.* if the estate be good for his life, as it is.

Powys and *Gould*, judges, agreed.

Holt chief justice. If a man grant a rent out of his lands to *A.* for the life of *B.* (b) shall not the rent extinguish if *A.* die? For there wants a grantee, and so it is here. An occupancy is for supplying the freehold, but the freehold of a copyhold estate is in the lord, and the tenant has only an estate at will.

Powell justice. There is no colour of doubt. It is agreed, that the lord may grant absolutely to one for life, for that will not defeat him of his heriot, which binds all the customary estates granted within the custom; and then the addition for the lives of the other two will not hurt the grant for his own life.

(a) Vide *Vaugh.* 201. 2. *Bl. Com.* 260. (b) Vide *Co. Litt.* 47. b. *Vaugh.* 201. *Com. Dig. Estates, F. 2.* 2d Ed. vol. 3. p. 247. 2 *Bl. Com.* 260.

Upon the second argument this term *Holt* chief justice said to serjeant *Hooper*, who argued for the plaintiff, I am glad I have heard another argument, because I suppose you will now be satisfied. The custom consists of three parts:

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1. As to the constitution of the estate granted, it must be by copy of court-roll: 2. As to the extent of the estate, it must not be above three lives: 3. As to the manner of the estate, which is different from the constitution of the law by the operation of the custom, viz. to two or three *habendum successive sicut nominantur*. When a custom enables the lord to grant for three lives, cannot he grant for one life. He may without doubt, for it is within the custom. The cases cited for the defendant are in point. Where the custom is to grant in fee, yet the lord may grant to one for life, with a remainder to another in tail, as in the case of *Stanton v. Barnes*, 1 *Cro. Eliz.* 373. And that is good, though the custom be to grant an intire estate in fee-simple. So where the custom is to grant for life, a grant *durante viduitate* is good; as in the case of *Downs and Hopkins*, 1 *Cro. Eliz.* 323. though it has a different determination, because it is a lesser estate, and so within the custom. As to the mischief you pretend, that if *T. N.* should become a bankrupt, and the commissioners grant over his estate, the assignee shall have it during the three lives; suppose it had been pursuant to the custom to three *successive*, and the tenant first named had become a bankrupt, and the commissioners assign his estate, the assignee is become tenant *pur auter vie* indeed, but no more, and afterwards the assignee dies during the life of the tenant, that is out of the custom, yet the lord shall have a heriot upon the death of the tenant; for though the statute of *James 1.* makes an alteration of the estate, it did not intend to prejudice the lord, and when the assignee is admitted, he becomes tenant according to the original constitution and tenure of the land. Here the grant is only to *T. N.* during his life, and the lives of the other two, the consequence of which is, that if *T. N.* die living the *cestuys que vies*, since there can be no occupant of a copyhold estate, the lord upon his death will have his heriot custom, and also the land; so that it will be no inconvenience, though the lord has no heriot upon the death of the other two, because he has the land itself.

Powell justice. If any prejudice might happen to the lord in this case, the grant would be void, but there can be none here. This grant is within the custom, and is as extensive as a grant to three for their lives, and is not a lesser estate than the custom contains, as a grant for his own life only would be; and that distinguishes this case from the cases cited. The case of *Venn and Howell*, 1 *Roll.* 511. is a strong case, for if there can be no occupancy, then there can

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can be no prejudice to the lord, but it will indeed be for his benefit; for upon the death of *T. N.* the other two lives fall in to the lord, so that, though he lose his heriot upon their deaths, it will be no loss to him. If the *cessary que vias* die during the life of *T. N.* the lord will have no heriot indeed, nor ought he to have any by the custom; for if the grant had been to them three, and they two had died during the life of *T. N.* the lord would not have been intitled to any heriot, for the custom is to have a heriot upon the death only of the tenant in possession. This case does not differ from that of *Venn and Howell*; the estate granted here is not greater than the custom warrants, but in effect less; because if *T. N.* die, living the other two, the lord will have the whole land. But your case upon the bankruptcy is fit to be considered, which is by force of a statute made since the resolution of *Venn and Howell's* case; but the commissioners cannot assign any other estate, nor in any other manner, than *T. N.* himself had it; and when *T. N.* dies, the estate determines, or if the assignee die, shall not the lord have a heriot.

Holt chief justice. The lord shall not have a heriot upon the death of the assignee, but upon the death of the bankrupt. The lord indeed must admit the assignee, but upon the death of the tenant bankrupt, the lord shall have his heriot, to which he is intitled upon the original admission of his tenant, and which is saved by the statute.

Serjeant Hooper. By the assignment of the commissioners which is usually made to several persons, the whole estate for the three lives is transferred to the assignees by the force of the statute, which is the estate the bankrupt had, and will continue after his death during the lives of the other two.

Holt chief justice. If originally the grant be not good for longer than his own life, and after his death there can be no occupant, sure the statute cannot enlarge the estate to the assignees: *quod fuit concessum per Powell.*

Holt chief justice. The custom is, that the lord shall have a heriot on the death of every tenant in possession; now if *T. N.* dies, living the other *cessarys que vias*, the lord will have his heriot, and the land too, and that is for his benefit.

Dowry and Gould judges of the same opinion.

Powell

Powell justice. If the assignee of the commissioners took an estate for all the three lives, yet the prejudice thereon to the lord is too remote to be considered, but we will give you our opinions upon that. *Holt* chief justice agreed.

SMARTER
v
PENHALLOW.

Afterwards, at another day, *Powell* justice said, the case of the bankrupt is not an objection in this case; it might have been made at the time of the resolution of the case of *Venn* and *Howell*; it is at the most only a remote consideration of a prejudice by the loss of a heriot on the death of the tenant; but the lord in this case has a great advantage by the coming in of the estate upon the death of *T. N.*

Holt chief justice. The commissioners cannot assign a greater interest than the tenant himself had, *T. N.* being tenant *pur auter vie*; when he dies, the estate of the assignee determines, and the lord must have a heriot upon the death of the tenant, and the custom is only to have a heriot upon the death of the tenant in possession; and although the assignee comes in by force of the statute, without any admittance of the lord, as an heir by descent has the estate cast upon him by the law, yet he must be subject to the fines and services due, under pain of forfeiture of his estate, for they are saved by the statute. By the custom of some manors, but it is not so found here, he that is first named in the copy may by surrender destroy the remainders of the other grantees; but if the first tenant purchase the manor, whereby the service is extinct, and the copyhold destroyed, yet that does not destroy the estates of the other two, because it is not by a surrender pursuant to the custom; and so it was adjudged in the common pleas some years ago. *Powell* agreed *in omnibus*.

Holt chief justice. The case of the bankrupt is not now before us; when that comes to be the case, I know not how it may happen. Let judgment be entred for the defendant, *per totam curiam*.

Gascoigne and his Wife, *vers.* Ambler.

Charging a woman with whoredom is not, generally speaking, actionable. R. acc. Str. 823. 2 T. R. 473.

D. acc. Bl. 753.

Acc. Com. Action on the Case for Defamation, F. 20. 2d. ed. vol. 1. p. 193. Sed vide 11 Mod. 195. Com. Action on the Case for Defamation. D. 10. 2d ed. vol. 1. p. 179.

CASE for these words spoken of the wife, viz. "You are a whore, and keep a man to lie with you:" on not guilty pleaded, verdict for the plaintiff; and on Mr. serjeant *Darnall's* motion in arrest of judgment, it was staid till, &c. the court seeming clear, that the words were not actionable.

White's Case. Ante 959.

S. C. with the judgment the other way. 3 Salk. 232. 6 Mod. 18.

A mandamus lies to restore a man to the clerkship of a trading fraternity. Vide Com.

Mandamus A. B. 2d ed. vol. 4. p. 205. 209. 2 T. R. 377.

A Mandamus was granted to restore Mr. *White* to the office of clerk of the company of butchers in *London*, and the court said, it was the same case with that of a town-clerk.

Hilary Term

2 Annæ Reginae, B. R. 1703.

Sutton's case.

A Motion was made on behalf of *Sutton*, late marshal of the king's bench, against *Southerne* the present marshal, who attended the court, to restore *Sutton* to the possession of the king's bench prison, out of which he pretended he was turned with force; and it was insisted, the court might do it on motion, because the prison was the prison of this court, and so under the more immediate care of the court, who would protect it from all force and violence. But *per curiam* this court cannot hold plea of a forcible entry on a motion, but *Sutton* must apply to the justices of peace of *Surrey*, who on finding the force, may restore him, or else he may indict them that turned him out forcibly. The motion was denied.

Tho' the marshal of the king's bench prison is turned out by force, the court cannot restore him on motion.

Carleton *vers.* Mortagh.

S. C. Salk. 268. 3 Salk. 399. 6 Mod. 206.

Intr. Mich. 2
Ann. B. R.
Rot. 76.

ERROR on a judgment in the king's bench, and want of an original was assigned for error. The defendant pleaded a release of errors, but laid no *venue* where the release was made. To which the plaintiff in error demurred. And adjudged the plea naught for want of *venue*. And then the plea amounted to a confession of the error. But the court made a question, whether they could not award a *certiorari ad informandum conscientiam curiae*, though the defendant cannot pray it: just as after *in nullo est erratum* pleaded, for the court ought to examine the errors; for if in error a release is pleaded and found for the plaintiff, yet if there is no error, the court cannot reverse the judgment; and if the release were found for the defendant, a different judgment (b) must be given, according as the error assigned is sufficient or not; for if it is a good error, the judgment must be, that the plaintiff be barred of his writ of error, and not that the judgment be affirmed; if it is not a good error, the judgment must be

Upon the plea of a release of errors the defendant ought to state venue for the place where the release was made.

Tho' the plea of a release of errors is bad, the court will not reverse the judgment without examining the errors. (a) S. C. 6 Mod. 113. Holt 275.

(b) Vide post 1046.

CARLETON
v.
MONTAGH.

that the first judgment be affirmed. And a rule was made for hearing counsel, whether the court should grant a *certiorari* or not. The *certiorari* was afterwards granted, Gould, Powys and Powell justices concurring. Holt chief justice *dissentiente*.

Etherington *vers.* Parrot.

S. C. Salk. 118. Holt. 102.

Warning a servant usually employed by a tradesman in his trade, that his master trusts a man's wife no more, is a sufficient warning to the master.
Vide Str. 1214.

ON evidence at a trial before Holt chief justice at Guildhall, in case for goods sold and delivered, the evidence to charge the defendant was, that the goods were took up by the defendant's wife to make her cloaths, and that they cohabited together: but on the defendant's side it was given in evidence, that his wife was an extravagant woman, and used to pawn her cloaths for money to buy drink, and be drunk; that she pawned a suit of cloaths, which cost 7 l. for 1 l. 8 s. and when her husband redeemed them, pawned them again; that at the time of buying these, she had very good cloaths; that she had bought cloaths here before, and her husband had paid for them, but when he paid for them, he gave notice to the plaintiff's servant, who received the money, that his master should trust her no more, which he promised not to do. And by Holt chief justice, If a husband turns away his wife, he gives her credit, wherever she goes, and (a) must pay for necessities for her; but if she runs away from him, he (b) shall not be liable to any of her contracts, for it is the cohabitation, that is an evidence of the husband's assent to contracts made by his wife for necessities. But if the husband have solemnly declared his dissent, that she shall not be trusted, any person, that has notice of this dissent, trusts her at his peril after; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption. For the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides, and if he does not provide necessities, her remedy is in the spiritual court. But here were sufficient necessities provided, and also the husband had forbid any trusting her, and notice to the defendant's servant usually employed by him in his trade, was a good notice to his master the plaintiff; and he cannot charge the defendant. Therefore he was nonsuited. Holt said also, if a wife takes up silks and pawns them, before they are made into cloaths, the husband shall not be liable for the silks, because they never came to his use: *contra*, if they were made into cloaths, and wore by the wife, and then pawned by her.

(a) R. acc. ante 444. Str. 1214. Burr. 2177. D. acc. 6 Mod. 171. Holt. 104.
(b) D. acc. ante 444. vide Holt 104.

Martin *vers.* Henrickson.

S. C. Salk. 287. Holt 756.

AT the sittings at *Guildhall* before *Holt* chief justice, in case for so negligently managing his ship, that it run over the plaintiff's barge. The plaintiff declared, that he was possessed of a barge laden with divers goods and merchandises generally, &c. The pilot was produced to give evidence for the defendant. But *Holt* held he was no witness, because he was answerable to the master of the ship in an action for the damages he suffered by his ill management, and consequently for the damages which should be recovered in this action against the defendant, the steering the ship being his province, and his management therein the cause of damage to the barge. Secondly, he held the plaintiff could recover no damage for the goods, because the declaration was too general; but the particular goods ought to have been mentioned, as in case for burning a house of goods. So this same term at the sittings at *Middlesex*, in case for words spoke of a woman *per quod* she lost her marriage with *J. N.* *Holt* refused to let evidence be given of a loss of marriage with any body, but *J. N.*

If a party to a cause would be intitled to maintain an action against a particular person in case of a determination against him, he cannot call such person as a witness. R. acc.

Burr. 2727.

Post. 1411.

Vide Gilb. Evi-

dence 122.

In a declaration for sinking a barge laden with goods the plaintiff can recover nothing in respect of the goods, unless he shews specifically what they were. Vide post. 1410.

Norris *vers.* Napper.

AT the sittings at *Middlesex* before *Holt* chief justice, on evidence in an action for money received to the plaintiff's use, the case was, that the plaintiff was a soldier in my lord *Arran's* regiment of horse in the defendant's troop; the regiment being commanded for *Holland*, the plaintiff and his horse were shipped on board a transport, and in their passage met with such a storm, that by the working of the ship the plaintiff's horse was killed; that several other horses were lost in the same storm, and the queen made an allowance of 15 *l.* per horse, for every horse that was lost, to remount the troopers, which was paid by the queen to my lord *Arran*, for all the horses that were lost, and by him laid out in buying horses, fifteen of which horses were sent to the defendant, to supply the loss in his troop; but before these horses came over the plaintiff was broke, and so was never remounted; that when the plaintiff came into the troop he brought in his own horse. *Holt* chief justice held, that this evidence maintained the action; for though the captain the defendant did not actually receive the 15 *l.* in money, yet he received a satisfaction, which was monies worth, and the plaintiff cannot bring *trouver* for the horse, because he cannot claim any one of the fifteen horses in particular, none having been ever delivered to him. But at the counsel's request it was made a case for his further

If each trooper of a regiment buys his own horse, and upon the loss of several horses the crown makes a certain allowance for each to remount the troopers, and which is paid to the colonel, tho' the colonel buys the horses, and sends them to the captain of each troop. Q. Whether if any of such troopers is broken before his captain gets his horse, whether he may not maintain an action for money had and received against his captain for the allowance in respect of his horse.

Quære, whether it was ever determined?

NORRIS

NAPPER.

A man cannot be a witness, where his evidence is to mend his security. Gilb. Law of Evidence 122, &c.

consideration. *Holt* held also in this case, that if *A.* advances money to carry on a cause, and has a security deposited in his hands for it, part of which is the thing in demand, though the residue of the security exclusive of this is sufficient security for the money, yet he cannot be a witness in the cause, because he swears to mend his own security.

Title *vers.* Grevett.

(a) D. cont. ante 707.
(b) D. acc. ante 707.
(c) D. acc. ante 707.
Vide 2 Bl. Com. 347.

AT the same sittings at *Westminster*, in evidence on an ejectment, it was said by *Holt* chief justice, that if a tenant at will enters upon a quarter, though but one day, he (a) cannot determine his will, but the (b) lessor may determine his will at any time, but if he does in the middle of a quarter, he (c) loses that rent. Secondly, a man that conveys lands may be a witness to prove he had no title, because that is swearing against himself, but he is not compellable to give such evidence.

Regina *vers.* Guise.

S. C. 3 Salk. 88. and somewhat differently. 6 Mod. 89.

Upon a mandamus to swear in two churchwardens duly elected, a return that they were not duly elected, is bad, unless it shews that neither of them was.
D. acc. arg. post. 1200.
Vide Str. 225. ante 559.
Doug. 79. see also post 1379 and the books there cited.

A *Mandamus* was awarded to swear *A.* and *B.* *debite electos* churchwardens. The return was, that *A.* and *B.* were not duly elected, without saying, *nec aliquis eorum*, and therefore the (a) return was quashed; for they must comply with the writ as far as they can, and if *A.* only was duly chose, he ought to be sworn: as where the parish chose one, and the parson the other by the canons, they ought to swear one, and return the special matter as to the other. If two be chosen by the parish by equal voices, when they ought to choose but one, so that they cannot tell which to swear; so if the parish choose two, where they should choose but one, they may return the special matter. So if the parish is to choose two, and to present them to the parson, who is to choose one of them, and both sue a *mandamus*, they may return the special matter; for they cannot tell which to swear. *Per curiam.*

(a) See vide 6 Mod. 89.

Tilly's case.

S. C. Salk. 286.

ON a trial at bar in the common pleas, on evidence this question arose: depositions had been took in chancery *in perpetuum rei memoriam*, and it happened afterwards, that the inheritance of the land descended to the party, who was sworn as a witness, and was party in the ejectment; and the question was, whether these depositions could

could be read in the cause. *Trevor* chief justice seemed to be of opinion, that they ought to be allowed, because it was by the act of God the party was disabled from giving evidence, and it was the same in effect, as if he were dead. *Tracy* and *Blencowe* justices, *contra*. Thereupon *Tracy* justice came into the king's bench, to ask the judges' opinions, who all agreed, they ought not to be read; for *Holt* chief justice said, the intent of such depositions was to perpetuate testimony in case the witnesses died, and could not be read in any case between other parties, till after the witness's death, who ought to appear and give evidence so long as he lived; much less can they be read in this case, where the witness is a party. And to that *Trevor* chief justice of the common pleas agreed.

TILLY'S
Case.

Tawney's case.

S. C. 6 Mod. 97.

UPON a *mandamus* directed to the churchwardens and overseers of the poor of *Littleport*, in the isle of *Ely*. The writ sets forth, that *Tawney* was overseer of the poor of the said parish, and that in the said parish there were several poor people, who were usually maintained by, and had relief from, the said parish: that by reason of some differences in the parish, the churchwardens had not agreed to make a rate for relief of the poor; that *Tawney* being overseer, that the poor might not starve; had supplied them with money for their necessary relief, of which he had been reimbursed but in part only: that he had given in his accounts to the parishioners, who had allowed the same, but yet the churchwardens did refuse to agree to a rate for the reimbursing him, and therefore the writ commands them to make an assessment, to reimburse him the residue of the money disbursed by him, and not yet received. To this a return was made, that all the parishioners had not allowed his accounts, but that some of them did refuse; and that no justices of the peace had ever allowed the same, or had adjudged that *Tawney* did disburse the said sum, or that so much was still due to him, and therefore, that they could not make any rate. In *Michaelmas* term it was insisted by *Mr. Weld*, that this return is ill. For it is not necessary, that all the parishioners should agree to the allowing his accounts; but it is sufficient if the majority did, and that shall conclude the rest. And it is not to the purpose to say, the justices have not allowed the accounts, for the justices have nothing to do with it, when the parish do allow the account; and the justices cannot allow any thing before a rate be made, and after a rate is made by the parish the justices are to allow it. And this is not within the clauses of the statute of 45 *Eliz.* whereby the late churchwardens and overseers shall be obliged to pay over to the succeeding officers so much

A rate cannot be made to reimburse an overseer
S. C. 10 Mod. 104.
Salk. 531.
Holt 579. fo. 8.
3 Salk. 232.
R. acc. 8 Mod. 338. fo. 10.
But where an overseer is in advance for the parish, he may get a rate for the relief of the poor, and reimburse himself out of the money raised thereby.
S. C. Salk. 531.
Holt 579. fo. 8. acc. 8.
Mod. 338.
D. acc. post 1252. Vide 17 G. 2. c. 38.
f. 11. And the justices are compellable to sign and allow such rate. Vide 1 Sid. 377. pl. 5. Comb. 478, 479.
Str. 393.
Nelf. Just. 532.
Shaw's Prac. Just. 34. 43. 217.

TAWNEY'S
Case.

much as is remaining in their hands, to which the concurrence of the justices is necessary; but not in this case. It was a charitable act in *Tawney*, and the parish ought not to be eased thereby, but *Tawney* now stands in the place of the poor, as to the money he has disbursed for their relief. As if he had disbursed money for maintenance of a bastard child, before any order made by the justices for the keeping it, yet the order shall have a retrospect, and he shall be reimbursed. They ought to have returned in this case, that there is not so much due to him as he demands.

Mr. *Eyre* insisted, that the return was good. The majority in this case shall not conclude the rest, but all the parishioners must concur; because it is not a charge to which they are liable at the common law, as to the repairs of a bridge, or of the church; but they are only chargeable to the relief of the poor by the statute of 43 *Eliz.* by which the justices have the sole power of allowing the account. *Tawney* ought to have sued out a *mandamus* directed to the justices, commanding them to take the account, and determine it, for no rate can be made till that is settled, and this is not like a rate made for the poor, which is a public and visible thing. This writ is not good, for the overseer has no relief by law in this case. The statute of 43 *Eliz.* gives the justices no power to reimburse an overseer, for the act never intended to give the overseer power to charge the parish with a debt, but he must first raise the money by a rate, and then lay it out; and there is no necessity, that the justices should have such power to reimburse an overseer, because the statute designed, that the money should be disbursed only as it is raised. And so was the law in other parochial offices, as in case of constables and tything-men, who before the statute of 13 & 14 *Car. 2. c. 12. s. 18.* had no power to make a rate for the charges they were at in conveying vagrants to houses of correction, &c. So before the statute of 3 & 4 *W. & M. c. 12. s. 13.* the surveyors of highways had no remedy to reimburse themselves, for the money they expended in buying gravel and other materials, for amending the highways; and these were much harder cases, for the constables and surveyors before those statutes had no power at all to make any rate, but the overseers have a power to make a rate before they lay out their money: it is a defect in the law. The writ does not shew, that the money disbursed by *Tawney* was expended by him for the relief of such poor as wanted it that year he was overseer, so that for ought appears, he laid out the money for the relief of such poor as had subsisted before his time without his help. Besides, if he could have any relief in this case, he ought to have prosecuted it presently, and not to lie still so long as five years after. Perhaps the persons, that are now to be charged, were not then inhabitants, and paid to the poor of another parish. You will

will not allow restitution to be awarded on a forcible entry after three years, as was adjudged in this court, in the case of the *King v. Harris*. *Tr. 11 W. 3. ante 440*. The writ is not good as to the form of it, for it ought to command the overseers, &c. to raise a certain sum, and not to leave it to their discretions, to raise what they think fit.

Mr. Weld. If the inhabitants are not concerned in this matter, then their consent is not necessary; but here they have approved the account, and consented to the rate. *Tawney* demanded his money of the parish from time to time, and so it is alleged in the writ, and it is to his prejudice, that it was not paid before. The parishioners are liable by the statute of 43 *Eliz.* to pay for the relief of the poor, but they were not liable to pay any thing in the case of vagrants before the statute of 13 & 14 *Car. 2.* nor in the case of surveyors before the statute 3 & 4 *W. & M.* The words of the writ restrain the money to be disbursed for the relief of the poor of his time; the writ imports a certain sum, for the remaining debt is certain.

Holt chief justice. The question in this case is, how the law now stands? The statute of 43 *Eliz.* directs a method for the relief of the poor, by way of rate made by the officers with consent of the parishioners; but here *Tawney* has disbursed his money without any rate: can he do thus without any rate? He cannot disburse what money he thinks fit, the statute never intended to give the overseers such an authority; for then they might dispose of the parish money of their own head, as they pleased. Supposing that new poor happen to come into a parish after a rate made, the parishioners must make a new rate to supply them. The justices have a superintendency by the act as to poor rates, and you must pursue the method appointed by the act. It is hard indeed he should not be re-imbursed, but he cannot claim it of right, because he has not pursued the method of the statute.

New poor come into a parish after a rate is made, a new rate must be made to supply them.

Mr. Weld. It cannot be material, whether the rate be made before, or after the money expended, if the parish agree to it; and then it must be signed by the justices, who have power to relieve any one that is aggrieved on appeal, and the overseers can raise no more after the money laid out, than if the rate had been made before.

Holt chief justice. The rate must be made for relief of the poor, and not to re-imburse the overseers; though if they have laid out money before, they may re-imburse themselves out of the money levied upon such rate. You must give up your account to the justices, to bring this within the equity of the statute, that so it may appear to them,

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Case.

them, you are intitled to a rate. It is not material indeed, whether the money be disbursed before, or after a rate made; but then you must raise money by a rate for the relief of the poor, and not to re-imburse yourself. The overseers cannot charge the parish with what sums they please. The statute does not prescribe a particular method, as to the maintenance of bastards.

Powell justice. I would help you if I could. You laid out your money at your peril, for you cannot dispose of the parish money as you please. And on sudden accidents, if an overseer disburse money, he depends on the parish, but he cannot compel them to re-imburse him. The rate is not good, though the parish agree to it, till the justices approve it, nor is it leviable before. You should have complained before to the justices. If any of the parishioners oppose it, it cannot be made, and it is no rate till confirmed by the justices, and I doubt the defect is there.

Holt chief justice. If a rate be made, and accidents happen, which raise the necessary sum higher, no doubt but the overseers may disburse so much as the rate falls short, and then make a new rate for relief of the poor, but not to re-imburse themselves; and they must not be their own judges in that case, but ought to apply to the justices, who will certainly confirm such rate. *Tawney* should have made such a rate, whilst he continued in his office; the justices are intrusted with that matter, but if they had refused to sign and allow such rate, you should have had a *mandamus* commanding them to do it as usual.

Powys justice agreed, *Gould* justice agreed. You are not obliged to disburse your money, before you receive the parish money. It is an usual thing indeed, but if you do so, you must take care to make a rate for relief of the poor, and get it allowed by the justices, and thereupon levy the money, and re-imburse yourself.

Powell justice. It seems you have had a *mandamus* already to the justices, but it was too soon, because no rate was made by the parish; for there must be a preparatory rate to be approved by the justices. But you say, the parish turned *Tawney* out of his office before his time was expired.

Holt chief justice. Then he must bring his action. We will see to help you to a good *mandamus*: it is a compassionate case, but you must be relieved in another manner than by this *mandamus*.

This case was spoken to again that term. And Mr. *Pope* insisted, that this *mandamus* lies within the meaning of the statute

statute of 43 Eliz. for it will take away the whole effect of the act, if it shall be intended, that the overseers shall not lay out any money for relief of the poor, till it be raised; for then the poor might starve before any money levied, and so the statute would make no provision for the relief of the poor. See *Dalton's Just.* 153. On the other side Mr. Parker said, the statute does not extend to this case. There is no remedy for him, to re-imburse himself, after his year is out. It is too late to pursue this writ now after so long a distance of time, &c. much to the same effect with Mr. Byre.

Holt chief justice. The question is, whether we can relieve him now, when he has neglected to make use of the power he had to help himself. There is no necessity that he should pay money out of his pocket, for the churchwardens and overseers with the confirmation of the justices may order a sum of money to be levied for the relief of the poor without the concurrence of the parish. You should have made a rate during your own time. I cannot see any foundation for us to grant this *mandamus*. The law has prescribed a particular method, and we cannot alter the law, nor prevent the inconveniencies. Shall we relieve a man, that trusts when he needs not?

Powell justice. We cannot take notice of the usage in any county: we are now upon the construction of an act of parliament. This *mandamus* is very extraordinary, and so I thought when it was granted. You should have applied to the justices during your office. You laid out your money at your peril.

Powys and Gould justices agreed.

Holt chief justice. If an overseer lays out money for the relief of the poor, and then a rate is made after the same proportion, he may re-imburse himself; but here he has elapsed his time. Let the writ be quashed, *per totam curiam*.

Regina vers. Jones.

S. C. Salk. 379. 6 Mod. 105.

MR. Parker moved to quash an indictment. It is, that the defendant came to J. D. and pretended to be sent to him by J. S. to receive 20 l. for his use; whereas J. S. did not send him. This is no crime, and he has remedy by action.

Holt chief justice. It is no crime unless he came with false tokens. Shall we indict one man for making a fool of another? Let him bring his action. Powell justice agreed. Quash it *nisi*.

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Case.

Churchwardens
and overseers
with the con-
firmation of the
justices may
order money to
be levied for the
poor without the
concurrence of
the parish.
S. P. 6 Mod.
93. Holt 380.

R. acc. Str.
366, 1127. vide
1 Will. 301.
Barr. 1125.
1130. Salk.
151. 30 G. 2.
c. 24. post 1179.

Intr. Mich. 3
Ann. B. R. Rot.
333.

Nutt *vers.* Mills.

S. C. 6 Mod. 105. Salk. 6. Pleadings post vol. 3. p. 29.

An allegation that a party *suscepit* super se ordinem militarem, implies that he was made a knight bachelor. vide ante 859. on a dilatory plea in respect of some matter applying to the person of one of the parties, such matter may be stated without a venue. D. acc. 853. and see the books there cited.

IN an action of debt, the defendant pleaded in abatement, *quod ante exhibitionem billæ querens suscepit super se ordinem militarem, et jam miles existit.* To which the plaintiff demurred; because as it was said, the plea is uncertain, inasmuch as it did not appear what sort of knight the plaintiff was created; he might be a knight of the garter, or a knight of *Malta*, &c. but *per curiam*, *ordo militaris* is certain enough. Then it was said, that there was no venue laid, where the plaintiff *suscepit ordinem.*

Holt chief justice. There needs none, because the plea going to the person, it shall be tried where the action is laid. By the demurrer the plaintiff has confessed himself a knight.

A woman may be governess of a workhouse. vide a T. R. 395.

A Woman was appointed by the justices to be a governor of a workhouse at *Chelmsford* in *Essex*; and Mr. *Parker* moved to quash the order, because it was an office not suitable to her sex. But *per Powell* justice and the court, *absente Holt* chief justice, it is a good appointment, and she may act by a deputy. My lady *Broughton* was keeper of the gatehouse. 3 *Keb.* 32.

Bezaliel Knight's case.

S. C. Salk. 329. Holt 255.

If a defendant pleads a misnomer, and the plaintiff without discontinuing that action. Brings another against him by his right name for the same cause, he may plead the pendency of the other action to it in abatement. S. C. 3 Salk. 238.

And the plaintiff cannot avoid the effect of such

plea by entering a discontinuance to the first action. R. acc. ante 274. A discontinuance only operates from the time when it is entered. R. acc. ante 274. Vide *Doctrina Phœtandi* 67, 68.

(a) Acc. ante 274. (b) Acc. ante 274.

AN action was brought against him by a wrong name, and he pleaded it in abatement. Thereupon without more the plaintiff declared against him *de novo* by his right name, and he pleaded that action pendent, &c. for the plaintiff ought to have discontinued his first action. And *Holt* chief justice said, it was too late to do it now, because the discontinuance only relates to the time of its being entered upon the record; so that if the plaintiff should now enter it, and reply *nul tiel record*, it (a) would be against him, because it was a record at the time of the plea pleaded: and it is not like the reversing a judgment, or outlawry on a writ of error, which avoids the record *ab initio*; so that on *nul tiel record*, if the judgment be reversed before the day given to bring in the record, it (b) is sufficient.

Emerton *vers.* Selby, serjeant at law.

S. C. Salk. 169. 6 Mod. 114. Holt, 174.

IN replevin the defendant justifies the taking *damage feasant* in his freehold. The plaintiff in bar says, he is seised of a cottage, and prescribes for common in the defendant's land for all his cattle *levant* and *couchant*, as appendant to his cottage: the defendant demurred.

A claim of common for cattle *levant* and *couchant* on a cottage, is good. Vide ante 726. Vaugh. 253. 5. b. 2 Inst. 736.

2 Brownl. 101. Co. Litt.

Mr. Page. A man cannot prescribe for common for his cattle *levant* and *couchant* upon his cottage, for that cannot be; for there is no land belonging to a cottage, as there is to a messuage or house. But *per Holt* chief justice *et curiam*, it is a good prescription.

Powell justice. A cottage containeth a curtilage, and so there may be a levancy and couchancy upon a cottage, and it has been so settled. There is no difference between a messuage and cottage as to this matter. The statute *de extentis manerii* says, a cottage contains a curtilage. If there be four acres laid to it, it is a lawful cottage within the statute of 31 Eliz. c. 7. We will suppose that a cottage has at least a court to it.

4 Edw. 1. 4.

IN trespass, assault and battery, if the plaintiff lay the assault one day, and the defendant pleads a special matter that justifies at another day, whereby the day becomes material, the plaintiff may reply an assault at another day; and it is no departure, although it has been otherwise held, for the day is not material, and the plaintiff may maintain his count. *Holt* chief justice.

Acc. ante 120, 121. and see the books there cited. 1. Lev. 110.

Walden v. Holman.

THE plaintiff declared against the defendant by the name of *John*, who pleaded in abatement, that he was baptized by the name of *Benjamin*, *absque hoc, quod idem Johannes* was ever known by the name of *John*; and the plaintiff demurred generally.

If a man sued by the name of *John* pleads in abatement, that he was baptized by the name of *Benjamin*, *absque hoc quod idem Johannes* was ever known by the name of *John*, the plea is S. C. 6 Mod. 114.

absque hoc quod idem Johannes was ever known by the name of *John*, the plea is S. C. 6 Mod. 114. And shall be over-ruled on a general demurrer.

Holt chief justice. Matters of form may be taken advantage of on a general demurrer, when the plea only goes in abatement; for the statute of *Elizabeth* only means, that matters of forms in pleas which go to the action shall be helped on a general demurrer. So here, the plea is ill in form, for it is *absque hoc, quod idem Johannes*, &c. which is a confession of his name to be so, and makes the substance known by a different name than that mentioned in the declaration, a traverse that he was ever known by the name in the declaration is proper. S. C. 6 Mod. 114. Salk. 6. Holt. 493.

An exception may be taken to a matter of form in a plea of abatement on a general demurrer. Upon a plea in abatement that the defendant was

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quent matter repugnant; and by this traverse the defendant has waved the matter that went before, of his being baptized by the name of *Benjamin*, and has made the traverse the substance of his plea.

Powell justice. This plea is good in substance, and then will an immaterial traverse hurt it?

Holt chief justice. It is a good traverse, but informal; for the plaintiff may take issue on it; and in this case, since the defendant has not relied on the plea of baptism, the traverse is become material.

Powell justice. I think the traverse is immaterial, for a man can have but one name of baptism; and the defendant has alleged that matter sufficiently, and it will not be hurt by the traverse.

Holt chief justice. The matter of the baptism would have been a good plea of itself, for it implies a negative, that he might have concluded with it, and relied upon it, without saying that he was never called or known by any other name, for he can have no other *Christian* name. This plea is only dilatory, and not to the merits.

Let the defendant answer over, *per curiam*.

Intr. Trin. 2
Ann. B. R.
Rot. 146.

Crosse *vers.* Bilson.

S. C. Salk. 3. Pleadings Lill. Ent. 351. Gilb. on Distresses. 190.

The plea of *prisel en auter lieu* ought to be pleaded in abatement only. S. C. 6 Mod. 102. Holt 627. R. cont. Bullythorpe v. Turner, Barnes, 4 Ed. 351. If the defendant in replevin avows the caption in alio loco, pleads that it was his freehold, and that the thing taken was damage feasant, traverses the caption in the place mentioned in the declaration, and concludes with praying judgment and a return, this is a plea in bar. Vid. ante 593. The defendant in replevin need not pray damages either upon an avowry or a plea. S. C. 6 Mod. 102. Holt 627. If the defendant pleads in bar, and demurs to the replication in abatement, the plaintiff may join in demurrer, and if the demurrer is over-ruled he shall have final judgment. Where the defendant pleads in bar, and demurs to the replication, if the conclusion of the demurrer is, wherefore as before he prays judgment, and that the declaration may be quashed, the words "and that the declaration may be quashed" are surplusage, and the demurrer is a demurrer in bar. S. C. 6 Mod. 102.

UPON a writ of error in replevin out of the common pleas the plaintiff declares of the taking his mare *apud Hardingstone in comitatu Northampton, in quodam loco ibidem vocato* the king's highway. The defendant pleaded after this manner: *et praedictus J. B. venit, et defendit vim et injuriam, quando, &c. et ut ballivus prebonorabilis Willielmi domini Lempsler bene cognoscit captionem equae, &c. in quodam loco vocato* the queen's highway, *et juste, &c.* and says it was the freehold of the lord *Lempsler*, and avows the taking there *damage feasant; absque hoc, quod praedictus J. B. equam praedictam in quodam loco vocato* the king's highway *cepit, prout praedictus S. C. versus eum narravit; et hoc paratus est verificare. Unde petit judicium et retorum equae praedictae sibi adjudicari.* To which the plaintiff comes and says, *quod praedictus J. B. &c. captionem equae praedictae juste cognoscere*

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non debet ; quia dicit, quod ipse cepit equam in prædicto loco tunc vocato the king's highway, prout, &c. et hoc petit, quod inquiratur per patriam. The defendant demurs thereto in this manner : *Quod placitum replicando placitatum non est sufficiens in lege ad narrationem suam prædictam manutenendum, unde ut prius petit iudicium, et quod narratio prædicta cassetur.* The plaintiff joins in demurrer thus : *Ex quo ipse sufficientem materiam in lege ad ipsum S. actionem et narrationem suas manutenendum superius allegavit, &c. petit iudicium et damna.* Whereupon judgment was given for the plaintiff in the common pleas, and it was entered thus : *Quia videtur iusticiariis, quod placitum prædicti S. C. superius replicando placitatum, sufficiens in lege existit ad narrationem suam prædictam manutenendum, prout prædictus S. C. superius allegavit, &c.* and so final judgment was entered. Upon this judgment a writ of error was brought in this court. The matter upon the plea was debated in the common pleas, where the court were of opinion, that the plea was made a plea in bar by the conclusion, and that therefore the replication was proper. In *Michaelmas* term 2 *Annæ reginæ*, it was urged by Mr. *Salkeld* for the plaintiff in error. He insisted, that the plea was only in abatement, and that therefore the judgment ought to have been only, *quod ulterius respondeat*, and not final. He said, 'the matter of the plea is only on the place, and the cognizance of the taking *damage feasant* in his freehold is no parcel of the plea, but only added to intitle him to a return ; which the defendant in replevin has a right to do, being an actor as well as the plaintiff. He cited the case of *Butcher v. Porter*, Hil. 4 *W. & M. B. R.* where in replevin the defendant pleaded property in a stranger in abatement ; and could not have return, because he had made no cognizance. But it would have been otherwise, if he had pleaded property in himself, which is admitted by a demurrer, and thereby the property of the cattle is quite divested out of the plaintiff. Whensoever the defendant pleads matter, that goes not to the action, but in abatement only, as *prisal en auter lieu*, he can have no return without making cognizance. In this case the matter does not make the plea an intire cognizance but the matter, as to the taking *en auter lieu*, and the cognizance, are distinct, and the cognizance is not traversable. 9 *Edw. 4. 41. a. Hele v. Pitt*, Pasch. 2 *W. & M. B. R.* in replevin, the defendant pleads, that he took the cattle *en auter lieu*, and made cognizance for rent arrear ; and the plaintiff traversed, that any rent was arrear ; without saying any thing to the place ; and the defendant demurred ; and it was held a discontinuance because the cognizance was not traversable. See the case of *Watts and Hayden*, 3 *Cro. 372.* Although in this case the cognizance is incorporated with, and made part of the plea, whereas it should have been distinct, and should have come after the plea,

In replevin, if the defendant plead property in a stranger in abatement, he cannot have a return, unless he makes cognizance ; vide ante 217, 984, and the books there cited ; but contra, if he plead property in himself.

When the defendant pleads only matter that goes not to the action in abatement, as *prisal en auter lieu*, he cannot have a return without making cognizance. vide *Com. Pleader. 3 K. 13. 2d. Ed. vol. 5. p. 330.*

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36 H. 6. 18. a.

plea; yet that is only a difference in form, and the plaintiff should have demurred to it: but yet that does not make the cognizance traversable. The conclusion of this plea is not in bar, it is only, *unde petit judicium*, generally; whereas the conclusion of a plea in bar, is *unde petit judicium, si prædictus querens actionem suam versus eum habere debeat*. And it is the same in replevin, as in all other actions. And when it is said, *et returnum equale*, that makes no difference, for he does not pray return as defendant, but as actor, and consequently no part of the plea. He admitted, that if a man pleads matter in abatement, and concludes in bar, judgment final ought to be given: but this is only in abatement, for the *petit judicium* without more does not make it a plea in bar, and here is no prayer of damages. If a man plead matter in bar, and conclude in abatement, yet it is a plea in bar, and it is not made a plea in abatement by the conclusion, 37 Hen. 6. 27. a. but judgment final shall be given; because if the plaintiff has no cause of action, he ought not to bring any writ; but when a man pleads matter in abatement, and concludes in bar, in that case judgment final shall be given; because by his concluding in bar, the defendant admits the plaintiff's writ to be good. 18 Hen. 6. 27, 28. 32 Hen. 6. 17. b. 36 Hen. 6. 18. 22 Hen. 6. 53. b. *Medina v. Stanton*, Pasch. 12 Will. 3. B.R. Salk. 210. ante 593.

Holt chief justice. In that case we did not determine, that judgment final ought to be given; but we agreed, that if a *respondes ouster* were awarded, it would be no error assignable by the defendant, because to his advantage.

On the other side it was insisted by Mr. Pengelly, that judgment final was well given in this case, and ought to be affirmed. He did not cite cases to prove, that the conclusion of a plea in abatement as in bar makes it a plea in bar, because Mr. Salkeld had admitted it. But see these cases to that purpose. Bro. Pleader 14. 35 Hen. 6. 12. Bro. Brief 247. 36 Hen. 6. 18. a. per Littleton. Allen 17, 18, 65, 66. Burden v. Ferras. 1 Sid. 189, 190. Wright v. Bright. 1 Sid. 190. Ham et alii v. Hitchcock. 3 Cro. 202. Putt v. Neshworthy. 1 Vent. 135, 136, 137. 2 Kibb 795. Kemp v. Andretor. 3 Lev. 290, 291. And in such cases judgment final is always given, and not only a *respondes ouster*. (See Bro. Assize 146. 9 Ass. 23. Onely v. Fontleroy. Mo. 691.) So likewise when a plea begins in bar, though the matter be in abatement only, and it concludes in abatement, yet it is made a plea in bar, and judgment final shall be given; as Green v. Cole. 1 Lev. 311, 312. 3 Keb. 181. 3 Lev. 223. Sir Oliver Butler's case. 3 Lev. 221, 223. 17 Edw. 3. 59. p. 58. Baker v. Berisford. 3 Kibb 181.

As to the form of the plea in this case, he said, it was made a plea in bar, though the matter of it be only in abatement. For the defendant having incorporated the cognisance with the plea, and joined them both together, and having made but one conclusion to both, he has made the whole one intire plea, and the conclusion in bar goes to the place, as well as to the cognisance; for if it do not, the plea as to the place will be left without any conclusion at all. But the defendant ought to have concluded his plea, as to the place, *unde petit judicium de brevi*, or *de narratione*, and then have made a distinct cognisance, *et pro retorno habendo*, &c. or else, when he joins both together, he ought to have concluded in abatement to the whole, *unde petit judicium de brevi*, or *narratione*. And so are all the precedents, *Rast. Replevin, en auter lieu*, 554, 555, 556. *Astton* 475. *Hearn* 764, 765, 766, 767. *Thompson* 274. *1 Ventr.* 127. *41 Edw.* 3. 4. p. 7. *9 Edw.* 4. 41. p. 25. *1 Hen.* 7. 21. p. 10, 11. *12 Hen.* 7. 4. p. 3. *9 Edw.* 4. 64, a. 61. a. And in this case, although the defendant has not made his conclusion as full and large as the usual conclusion is, *scilicet, unde petit judicium, si prædictus querens actionem suam versus eam habere debeat*, but generally, *unde petit judicium*, yet that is a good conclusion in bar, and must be so intended; and if the defendant would have it taken only in abatement, he ought to have applied it, and have added *judicium de brevi*, or *de narratione*. And the common conclusion of every avowry or cognisance in bar is as this case, *scilicet, petit judicium et retorum averiorum*, and the commencement of the plea here is the same with an avowry or cognisance. As *1 Saund.* 187, 191, 194, 347, 348, 349. *2 Saund.* 194, 197, 283, 284, 310, 314. *2 Ventr.* 131, 133, 145, 148, 210, 211, 212, 224, 225, 226, 227. *Co. Intr. Replevin* 575, 576, 578, 583. *Rast. Replevin* 561, 562, 558, 559. And although in this case the defendant has not prayed damages, as is done in those cases, yet that will make no alteration in the plea, nor make it less a plea in bar, because at the common law the defendant in replevin did not recover any damages, but they are given by the statutes, *7 H. 8. c. 4.* *21 H. 8. c. 19.* yet since those statutes the defendant may waive the prayer of damages, and the plea will stand compleat, as at common law. He insisted farther, that the manner of joining in demurrer, though it be informal, yet it will not hurt the plaintiff; for though the defendant has demurred in abatement, the plaintiff has joined in demurrer in bar, and thereby the whole matter being brought before the court, the court ought to give a final judgment; and the manner of the defendant's demurrer shall not alter the judgment of the court: as is adjudged in *Sir Oliver Butler's case*, *3 Lev.* 221, 223. *Putt v. Nofworthy.* *1 Vent.* 135, 136, 137. *2 Keble* 795. *Shalmer's case*, cited *3 Kelle* 181. (but it seems that case is not truly cited there, for the

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case is otherwise reported in *Allen* 17, 18.) *Foster v. Jackson*, *Hob.* 56.

Holt chief justice. The plea of *prisel en auter lieu* is a plea in abatement, and no plea in bar; and therefore being pleaded in bar, as it is in this case, it is ill. The defendant ought to have begun as is usual in abatement, and have concluded, *et petit judicium de brevi*, or *de narratione*, and then made cognisance distinctly, *et pro retorno habendo*; or have said, *petit judicium de narratione, ac etiam petit returnum*, &c. and that would have been good. Here the defendant has concluded in bar upon the whole plea, as well upon the matter of cognisance, as upon the traverse of the place; and he need not pray damages, because they are given by the statute. By this conclusion the defendant has waived the first part of his plea, and his traverse as to the place; and being in bar, it goes to the matter of the cognisance. When matter of abatement is pleaded in bar, it is ill, and judgment final ought to be given.

Powell justice. The conclusion is in bar, and judgment final ought to be given. The defendant should have concluded his plea as to the place, *et petit judicium de brevi* or *de narratione*, and have made cognisance *pro retorno* severally. This plea is as much in bar, as an avowry can be; the defendant in the beginning of his plea makes cognisance, whereas he ought to begin and pray judgment of the writ or count, and to have concluded in the same manner.

And accordingly the judgment was affirmed *nisi causa, &c. per totam curiam*.

The last day of *Michaelmas* term Mr. *Salkeld* came to shew cause upon the rule. And he insisted, that the judgment ought to be reversed upon other errors. He said, that the whole suit was discontinued, for admitting the plea to be in bar, and as a cognisance, and so the replication in bar likewise; then, when the defendant comes, and demurs in abatement, that is a discontinuance; for all the proceedings before being in bar, there is nothing to relate to it; and the plaintiff should not have joined in demurrer as he has done in bar; but should have taken his judgment by *nil dicit* for want of an answer. The conclusion makes the plea, and want of a conclusion, or a misconclusion, is the same; and both make a discontinuance. And so was it resolved in this court, between *Carter* and *Davis*, *Pasch.* 3 *Will. & Mar.* *Salk.* 218. In case the plaintiff declares on an *indebitatus assumpsit*, and a *quantum meruit*; the defendant, as to the first count pleads *non assumpsit*, and pleads a matter in abatement as to the second count; the plaintiff takes issue on the *non assumpsit*, and as to the plea in abatement occasions a discontinuance. *R. acc. ante* 393. *Salk.* 218. pl. 2. *Sey.* 46. *Vide ante* 338. post 1054.

A demurrer in bar to a plea in abatement occasions a discontinuance.

he demurs, *quia placitum minus sufficiens in lege existit ad ipsum ab actione sua præcludendum*; and the defendant joined in demurrer, and it was held a discontinuance. But farther he said, there is no final judgment given; for it is according to the defendant's demurrer, *scilicet, quod placitum replicando placitatum sufficiens est in lege, ad narrationem suam manutenendum*, and not *ad actionem manutenendum*, as it ought to be: so that the judgment is only in abatement, and not in bar.

Mr. Broderick of the same side insisted on the same matter, and said, that the court cannot give judgment to affirm the former judgment; but ought to award a *repleader*. Hereupon the last rule was discharged, and the matter adjourned to be spoken to again the next term.

In Hilary term Mr. Broderick insisted, that this plea must be taken as a compleat cognisance in bar, and not in abatement, and then there is nothing to support the judgment as given; for here is no replication, as is supposed, and as it would be in other actions, but it is a bar of the defendant's cognisance; and therefore both in the demurrer, and in the judgment, it ought not to be as it is, *quod placitum replicando placitatum*, &c. but *quod placitum in barra cognitionis placitatum*. For when the defendant pleads a plea in bar, he begins, *quod querens actionem suam habere non debet*, and a replication is, *quod ipse ab actione sua habenda præcludi non debet*; but the beginning of a cognisance in replevin is, *bene cognoscit captionem averiorum*; and then, when the plaintiff comes, and says, *quod captionem jussu cognoscere non debet*, that is a bar to the cognisance, but not a replication. Here is a discontinuance, and the court can give no judgment but to replead; for a demurrer, as an issue, must comprise the whole matter in plea, and if any part be omitted, it is a discontinuance, because the whole matter is not brought before the court. As in the case of *Johnson and Turner*, *Yelv.* 5, 6. (See *Yelv.* 137, 138.) And in this case here is not a sufficient confession of the plaintiff's action by the defendant's demurrer, upon which the plaintiff ought to have judgment.

On the other side, Mr. Word said, that by the demurrer the matter of the replication is confessed, and the conclusion *ad narrationem* makes it a demurrer in bar, and not merely in abatement; and if it be in abatement, yet it will be no discontinuance, because the judgment is to be given on the plea in bar, as an ill plea. But our replication is good, and that is the difference upon the resolution of *Bonner and Hall*, *Mich. 9 Will. 3. B. R. Ret.* 558. ante 338. and *Bisse v. Harcourt*, *Hil. 1 Will. 5 Mar. Carth.* 137. 3 *Mod.* 281. *Saik.* 177. In this case the judgment ought not to be reversed for this informality, inasmuch

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as the plaintiff is intituled to have judgment upon the avowry, as in the case of *Bennet vers. Holbeach*, 2 Saund. 317, 319. See 1 Cro. 443. 1 Roll. 805.

(a) R. acc. ante
338. D. acc.
ante 594.

(b) R. acc. ante
338. D. acc.
ante 594.

(c) Vide ante
320.

Holt chief justice. When the defendant pleads a matter of fact in abatement, and the plaintiff in his replication traverses or takes issue thereon, there (a) it is proper for him to pray damages, because if it be found against the defendant, judgment final shall be given. But where the plaintiff by his replication confesses the plea, and avoids it by special matter, and does not traverse the matter of the plea, there (b) the plaintiff must maintain his writ, and ought not to conclude to the country. In replevin, if the defendant avows the taking in another place, and traverses the place alleged in the count, without concluding to the writ or count; but makes avowry *pro retorno*; in that case the plaintiff must maintain his writ and count, and may take issue on the place, and pray damages, and that would have been right; the plaintiff has nothing to say to the avowry, if it had been but in a proper place, and here he takes issue on the place. Where there is a demurrer to a plea in abatement, the (c) judgment is only, *quod ulterius respondeat*, but on an issue judgment final shall be given.

Powell justice. This form of pleading is unusual, but there is not much in the case. *Prisel en auter lieu* is a proper plea in abatement. But besides the defendant must make cognisance for a return, for without a title he shall not have return; but the avowry to have return is no part of the plea, and the plaintiff can say nothing to it, it being only to intitle the defendant to have return, in case the writ be abated. But in this case, they are both jumbled together, and it looks like a common avowry, but it cannot be taken so, but it puts the plaintiff to maintain his count. The point of the plea is only in abatement, and yet upon issue found against the defendant, the plaintiff would have had a final judgment. This is a replication by the plaintiff, because it is not pleaded to the cognisance; then indeed it would have been a bar, but it is pleaded in maintenance of his count; the manner of joining demurrer will not hurt. But here is final judgment, and that seems to be the chief point.

Holt chief justice. The whole depends upon the plea in abatement, for the plaintiff cannot answer to the avowry, but to the place; and if the writ be bad, the defendant shall have return. In this case the plea is informal, but it is to the same effect; and the want of form shall not hinder the plaintiff from having his judgment: it is not a bar of the cognisance, but a replication, being in maintenance of his writ. If the defendant had concluded his plea *petit judicium*

de narratione, and prayed return distinctly, it would have been right; but here he has concluded in bar.

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Powell justice. By his conclusion he has made it a plea in bar.

Holt chief justice. The fault is in the defendant, when he demurs in abatement, but the plaintiff's replication is good.

Powell justice. The plaintiff could do no otherwise. He can only answer to the taking, and could not have entered judgment by *nil dicit* upon the defendant's demurrer; so that there seems to be no discontinuance. *Holt* seemed to agree it, but the court took time to consider. And afterwards at another day they all agreed that the judgment ought to be affirmed.

Holt chief justice said, the defendant's plea is in bar, and so is the replication; and though the defendant concludes his demurrer in abatement, yet that shall not alter the judgment of the court, but judgment final shall be given. The defendant has both begun and concluded his plea, in bar; and when he traverses the place, he waves the matter of the cognizance, which went before; and then concluding, *unde petit judicium et retornum*, &c. that is in bar, for he should have concluded *unde petit judicium de brevi or de narratione*. An avowry is a bar of the action, and a replevin is in nature of an action to demand his cattle again, and when judgment is given against the plaintiff upon the avowry, he is barred of his action, and the entry is, *quod querens nihil capiat per breve*. Then the defendant's plea beginning and concluding in bar, the plaintiff in his replication takes issue upon it, and when the defendant demurs in abatement, he shall not thereby alter his own plea in bar; and although the plaintiff might have taken judgment by *nil dicit*, yet judgment may be well given in bar upon his joinder in demurrer.

Powell justice of the same opinion, that judgment ought to be affirmed. The defendant's plea is in bar, and the plaintiff by his replication has taken issue thereon; and then, when the defendant demurs in abatement, that shall not alter the judgment, but it shall be in bar.

Mr. Broderick. It is a discontinuance, upon the case of *Johnson and Turner*. *Yelv.* 5.

Holt. There is only a demurrer to part of the bar, and nothing said to the other part, and so joined. But still it is better in the present case; for the conclusion of the defendant's

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dant's demurrer is, *unde ut prius petit judicium*, and if he had stopped there, it had been a good demurrer in bar; and then, when he goes on and says, *et quod narratio cassetur*, it is a superfluous addition and void. Judgment affirmed.

It seems this form of the plea is good in bar, *quod quaere*.

Intr. Hil. 13
Will. 3. B. R.
Rot. 271.

Clements *vers*. Scudamore.

S. C. Salk. 243. 6 Mod. 120. Holt. 124. 1 P. Wms. 63.

Where lands would at common law descend to the issue of the eldest son *jure representationis*, they will by the custom of Borough English descend upon the issue of the youngest.

IN ejectment the jury found this special verdict, that J. S. having issue five sons, his youngest son died in the life of J. S. the father, leaving issue a daughter, who is the lessor of the plaintiff; afterwards the father purchased the lands in question; which are copyhold lands of the nature of *Borough English*; and the jury find, that by the custom these lands are descendible to the youngest son and his heirs. Afterwards the father died, and the eldest son entered, and made a lease to the defendant, upon whom the daughter entered, and made the lease to the plaintiff, upon whom the defendant re-entered, whereupon the plaintiff brought his ejectment. This case was twice argued at bar, and this term by the opinion of the whole court judgment was given for the plaintiff. *Holt*, chief justice delivered the reasons of their opinion as follows.

The question in this case is, whether the daughter of the youngest son, the lessor of the plaintiff, shall inherit to these lands *jure repræsentationis*, or the eldest son.

We are all of opinion, that the daughter ought to have these lands *jure repræsentationis*. Wherever this custom hath obtained, the youngest son is thereby placed in the room of the eldest son, who inherits by the common law; and there is no other difference in the course of descent, but that the custom prefers the youngest son, and the common law the eldest son; and therefore as at the common law the issue of the eldest son, female as well as male, do inherit *jure repræsentationis* before the other brothers, so by the same reason, where this custom has transferred the right of descent from the eldest son to the youngest, it shall also carry it to the daughter of the youngest son by like representation; and there is no reason to make any difference between a descent by this custom, and at common law, though my lord *Coke* is of another opinion. Yet it appears from the best authors, as *Lambard's Saxon Laws, inter leges Gulielmi Primi*, 36 fol. 167. and *Selden's Eadm.* 184. that all the lands in England were of the nature of gavelkind, and descended equally to all the issue, before the conquest; but this was soon after altered, when tenures by knights service were intro-

All lands in England were before the conquest, gavelkind.

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introduced for the defence of the realm, and then for the preservation of the family and tenure, the descent was restrained only to the eldest son, but yet, notwithstanding this alteration, the right of representation did continue to hold place. And by the common law, if the eldest son, happened to die, living his father, leaving issue a daughter, the inheritance descended to her before any of the other sons; so that a female by way of representation was yet preferred before the males, because the right of representation was not altered.

This right of representation is not peculiar to the law of England, but is observed by the laws of all countries; as you may see in *Numbers*, c. 26. v. 33. and c. 36. for although by the *Jewish* law the males inherited exclusive of the females, and the eldest son had a double portion of his father's estate, which was conferred on him as the first begotten; yet we find when *Zelophehad* the son of *Hepher* died, leaving no sons but daughters, and the daughters came unto *Moses*, and claimed the possession of their father; this being a new case, *Moses* it is said, brought that cause before the Lord, who commanded him to give unto them the possession of their father. So that it was here determined, that they should take the double portion belonging to their father as the eldest son, by right of representation. So is *Selden de Successionibus apud Hebræos*, c. 23. This right of representation was also practised among the *Romans*, and was the law of the twelve tables. And this right of representation holds in inheritances descendible by custom, as well as by common law; as in case of gavelkind lands, where the custom in pleading is thus set out. *Rass. Custom 143. a. quod terrarum et tenementa de tenura de gavelkind de tempore, &c. inter hæredes masculos partibilia et partita fuerunt.*

And yet, if a man seised of gavelkind lands have issue three sons, and one of the sons die in the life of his father, leaving issue a daughter, and afterwards the father dies; no doubt but this daughter shall inherit the purparty of her father, though she be not within the words of the custom, viz. that the lands are partible *inter hæredes masculos*; but the custom by construction shall extend to daughters *jure repræsentationis*; and there is no difference between the custom of gavelkind and this custom of *Borough English*, only in respect of the quantity of the land which the heir takes. There each son takes an equal part, but here the youngest son takes the whole; but that will not vary the reason in construction of the customs. The common law takes notice of these customs of gavelkind and *Borough English*, and there is a very remarkable case adjudged in my lord *Bridgman's* time, which is not reported in any printed book; it was in the year 1660, 1661, and it was entered *Hil. 1655. Rot. 779 C. B. int. Hale and (b)*— There the case was, that copyhold lands of every tenant dying seised were descendible by the custom of the manor to the youngest son; and a sur-

Where lands would at common law descend upon the issue of the eldest son jure representationis, they will by the custom of gavelkind descend upon the issue of any of them.

So ruled on a trial at bar in ejectment. Mich 8 Ann. 1709. for lands in Kent of the demise of three M^{rs}. Leonard's nieces to the earl of Suffolk, vers. the earl. (a) D. ace post 1292. Somn. 7.

(a) D. ace, 1 Bl. Com. 76.

(b) Cit. 2 Keb. 158.

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Copyholders of the nature of Boro' English will descend to the customary heirs tho' the ancestor died before admittance.

Acc. 1 Vent.
261. 2 Sid. 61.
1 Mod. 102.

A right of entry into Boro' English lands will descend upon the person upon whom the lands would have descended.

D. acc. 8 Co.
43. 2.

render was made to the use of *B.* and his heirs, who died before admittance. If *B.* had been admitted, it was agreed that after his death the youngest son should have inherited, but dying before admittance, the question was between the eldest son and youngest son of *B.* who should have the lands; and it was adjudged, that the eldest son in this case should inherit, because of the straitness of the custom, that the land should descend, and so here was no estate in the ancestor to descend, there never being any seisin in the ancestor. But by my report, it would have been otherwise, if it had been alleged, that the lands were of the nature of *Borough English* (which it was not, but only set forth as a particular custom) because the law takes notice of the custom of *Borough English*, but not of that special custom, and in pleading that lands are of the nature of *Borough English* you need not set forth the custom specially for that reason. This case seems at first to be against me, but the reason of the distinction there taken makes for me. In the present case the finding of the custom does not exclude the daughter, but does expressly comprehend her, for it is found, that the lands are descendible to the youngest son and his heirs, though without that express mention of his heirs the daughter should inherit. Now this custom is not to be strictly taken according to the letter, but must be construed so as to comprehend the necessary consequences and incidents in the course of descents; and therefore, though the father be disseised and die, so that he is not seised at the time of his death, yet the right of entry shall descend to the youngest son, and although the son should die before any entry, yet without doubt the right shall go to the daughter, although the son did not die seised within the words of the custom. And in this case if a descent be cast, the youngest son shall have his age, as much as if he were heir at the common law. And there is no reason why the representative of the youngest son, viz. the daughter, should not be included within the meaning of the custom. See the case of *Reeve and Malsler*, 1 Roll. 624. 7 Vin. 560. 2 Danv. 549. pl. 1. *W. Jones* 361. *Cro. Car.* 410. where the custom of the manor was, that if any person died seised in fee-simple of lands within the manor, that the same should descend after his death *filio juniore hujusmodi tenentis customarii sic obientis seistii secundum naturam de Borough English land*; a tenant of the manor being seised in fee, surrendered his land to the use of himself and his wife and his heirs; afterwards he had issue three sons and died so seised of the reversion; and afterwards the youngest son died in the life of the wife without issue; and then the wife died: and the question was, whether the eldest or middle son should inherit. And the judges were divided; *Berkley* and *Brampton* held, that the middle son ought to have the land, but *Jones* and *Croke* held, that the eldest son ought to inherit. Now I observe first, that there

there the custom was more special than in our case, for there it was not, that if a man died seised generally, that the lands should descend to his youngest son, but if he die seised specially, viz. in fee simple; and yet in that case *Jones and Croke* held, that the descent of the reversion to the youngest son had satisfied the custom.

It was objected by Mr. *Weld*, who argued on the part of the defendant, that whoever takes by descent must make himself heir to him that was last actually seised, but the father was never seised, and the daughter cannot make herself heir to the grandfather. But in answer to that it must be intended in this case, that she must make herself heir to him that was last seised, according to the custom; and if the custom extends to representatives, then she is heir to her grandfather, who was last seised. As the daughter of the eldest son at the common law *jure representationis* makes herself heir to her grandfather, so the daughter of the youngest son here makes herself heir to her grandfather by the custom. The case of *Godfrey and Bullock*, 1 Roll. 623. n. 3. is a full authority for me. There the custom was, that if a man died without issue male, that his eldest daughter should have his land: and the tenant had no issue male, but had issue several daughters; the eldest daughter had issue a daughter, and died in the life of her father; this grand-daughter is within the custom, and shall have the land by descent upon the death of the grandfather. Now by the common law the eldest daughter has not the preference of the rest, but all inherit equally. Yet custom may give the inheritance to the eldest daughter, and then her issue shall take it *jure representationis*: this is as strong as a descent in *Borough English*. But the case of Sir *John Savage* in 1 Leon. 109, 208. is objected: There the custom was, that if any man took to wife a customary tenant of the manor, and had issue, and overlived her, he should be tenant by the curtesy; a man married a woman to whom a customary tenement did descend during the coverture, and had issue and survived her; yet it was there adjudged, that he should not be tenant by the curtesy, because the woman was not a customary tenant at the time of the marriage, and so not within the custom, which shall be taken strictly. Now admitting that case to be law, it does not affect the present case; for there is a particular custom, which gives the estate to the husband under particular qualifications; but here the custom alters the descent by the common law to the eldest son, and carries it to the youngest son generally, and must have all the consequences of descent, only with the difference of the person. This exposition of the custom will tend to quiet and settle estates and titles in *Borough English* lands. Whereas, if the other opinion should prevail, it would unsettle them; but by this resolution they will be left on certain and settled foundations.

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Judgment for the plaintiff, *per totam curiam*.

Note, upon the first argument both *Holt* and *Powell* denied *Sir John Savage's* case, 2 *Leon.* 109, 228. to be law.

A descendible freehold created in Boro' English lands will descend as an estate in fee would. R. acc. 1 *Freem.* 395. 399. 3 *Keb.* 475, 486, 498. D. acc. Co. Lit. 110, b. acc. 2 *Vern.* 226.

A rent granted out of Boro' English or gavelkind lands will descend as the lands would. R. acc. 2 *Lev.* 87.

Holt chief justice. It was adjudged in this court in one *Townsend's* case, that where a lease was made to a man and his heirs during three lives, of lands in *Borough English*, that the youngest son should inherit the descendible freehold, though it were a new created estate; because the custom was so annexed to the land, as to affect that estate. So if a rent be granted out of lands, of the nature of gavelkind or *Borough English* to a man and his heirs, it shall descend to the youngest, or all the sons.

Sir William Moore's Case.

S. C. Salk. 626. 6 Mod. 95. 3 Salk. 148.

A man may be arrested on a Sunday under an escape warrant.

MR. Gould moved to discharge a prisoner out of custody, who was taken on a Sunday by virtue of a judge's warrant upon the late act of parliament to prevent escapes 1 *Ann. s. 2. c. 6. s. 1.*; but it was refused by the whole court.

And a gaoler may retake upon a Sunday, on fresh pursuit a prisoner who has escaped from him. Semb. acc. Bl. 3273.

Holt chief justice. We are all agreed in this court, that he ought not to be discharged, because it is a retaking upon an escape, in nature of a fresh pursuit; and although the word warrant be mentioned in the statute of *Charles II.* 29 *Car. 2. c. 7.* yet this warrant is not within the meaning of that statute; for that statute must be intended of an original taking, and not a retaking, as this is. And if we should not allow this warrant to be executed upon a Sunday, the statute would lose a great part of its effect. The marshal upon such escape may retake a prisoner upon a Sunday without a warrant, much more shall it be lawful to retake him upon a Sunday by force of a warrant upon this statute, which is intended in aid of the creditor. And this warrant being of a new nature, created by a subsequent statute, cannot be intended within the intent of the statute of *Charles II.* preceding; for though a subsequent statute may be comprehended within the meaning of an act precedent, as the statute of 22 *Henry VIII.* of wills within the statute of 27 *Henry VIII.* of jointures; yet that is, when the latter statute is within the same reason as the former, which this is not. The defendant has done a wrong by escaping, and he ought not to be suffered to take advantage of it: the words of this act are general without limitation as to time. The judges of the common pleas are of another opinion, but I cannot satisfy myself with their reasons. I think the better day the better deed.

Powell

Powell justice agreed in omnibus. This act was made to suppress a mischief, and ought to be extended.

Sir WILLIAM MOORE'S Case.

Per curiam, bring your *audita querela*, and then you may have this matter settled at this parliament.

The barons of the exchequer, as I was informed, are equally divided.

There was the like motion before this term, and the court were then of the same mind.

Regina vers. Langley.

THE defendant was indicted, for speaking certain words of the mayor of *Salisbury*, viz. "You, Mr. Mayor, I care not a fart for you," at one day; and on another day, "You are a rogue and a rascal." And to this indictment the defendant demurred.

'Tis not indictable to tell the mayor of a corporation you do not care for him, or to call him a

Rogue, &c. Rascal. S. C. 6 Mod. 124. Salk. 697. 3 Salk. 190. Holt 654. vide Salk. 697. pl. 2. Comb. 46, 66. 3 Mod. 139. Rex v. Pocock. B. R. Tr. 14, 15 G. 2. Tho' the words were spoken to him when he was within the borough.

Mr. *Ward*. No indictment lies for these words, for although they are said to be spoken of the mayor of *Salisbury*, yet it does not appear they were spoken of him whilst in the execution of his office. 1 *Roll. Rep.* 79. 11 *Co.* 95, 96, 97. A man cannot be imprisoned or fined for such words spoken of a magistrate out of court, and then he cannot be indicted. 3 *Cro.* 78, 689. *Moore* 247. 1 *Ventr.* 16.

Mr. *Eyre*. The words are indictable, for they reflect upon the mayor's integrity, and arraign him of a crime, and it concerns the publick to maintain the honour of magistrates. 1 *Cro.* 503, 504. 2 *Bulstr.* 139, 140.

Holt chief justice. The mayor had done well, if he had bound the defendant over to his good behaviour. It is a disparagement of the government, who put an ill man into office.

At least an indictment inde will be bad, if it does not shew that he was a justice of the peace. S. C. 6

Mod. 124. Salk. 697. 3 Salk. 190. Holt 654. vide Salk. 697. pl. 2. Comb. 46, 66. 3 Mod. 139. But a mayor might bind a man over to his good behaviour for such words. S. C. 6 Mod. 124. Salk. 697. 3 Salk. 190. Holt 654. vide post 1369. Rex v. Pocock. B. R. Tr. 14, 15 G. 2.

Powell justice. If the mayor had been in the execution of his office, he might have committed the defendant; and the difference of the officer's being in execution of his office or not is taken in cases of justification in false imprisonment, or on a *habeas corpus*, where the party is brought up in custody. But what remedy is there when the officer cannot

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commit the offender? What is the meaning of the words in a commission of *oyer and terminer, et de propealationibus verborum*?

Holt chief justice. They mean words against the government, or which amount to a *scandalum magnatum*. But this is an extraordinary thing to indict a man for these words.

At another day in *Michaelmas* term Mr. *Mountague* insisted, that it is an offence indictable; for it is laid, that the defendant spoke the words to the mayor, being then in *Sarum*. So that, though he was not in the execution of his office, yet he was within his jurisdiction, wherein he is always in execution of his office, and the words relate to his office.

Mr. *Ward* said, there is a difference between an officer appointed by the queen, as a justice of peace, and an officer elected by a corporation.

Holt chief justice. It does not appear, that the mayor of *Sarum* is a man of worship, that he is a justice of peace; for though he be a mayor, it does not follow, that he is a justice; for that must be by a particular grant in the charter.

Gould justice. See *Darby's* case, 3 *Mod.* 139. "You are a buffle-headed justice," and held (a) not indictable, and yet they were spoken to his face.

Powys justice agreed. See 1 *Ventr.* 16.

Powell justice. These words spoken to the mayor's face tend to the breach of the peace.

Holt chief justice. They are not a breach of the peace, but they may provoke to it. But I do not know what power Mr. Mayor has.

Powell justice. He is the head of the body politic, and it is an office which concerns the government.

Holt chief justice. These words do not tend more to the breach of the peace, whether spoken in the presence or absence, to himself or some other person. A magistrate may commit the party for speaking such words, if he refuse to find sureties for his good behaviour; but such commitment must be made presently.

This term the indictment was quashed, *Powell* mutata opinione.

(a) According to the reports of this case in 3 *Mod.* 139. *Salk.* 697. and *Comb.* 46, 66. the court held the words indictable, and gave judgment for the crown.

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Holt chief justice. I am not satisfied that these words will maintain an indictment. It is not said, that the mayor is a justice of peace, nor that he was in the execution of his office. These words are cause to bind the defendant to his good behaviour. If the defendant had abused him in writing, that would have been indictable: as in *Somer's* case, 1 Sid. 270, 271. 1 Lev. 139. for that is a libel; and the mayor might also have his action. A man was indicted for saying of an alderman, that whenever he put on his gown *Satan* entered into him; but it was quashed, as not being indictable. See 1 Ventr. 16.

Powell justice. Words that tend directly to the breach of the peace are indictable.

Holt chief justice. Yes, if one man challenges another.

Powell justice. They are rude words. The mayor should have bound him to his good behaviour.

Let the indictment be quashed *per totam curiam*.

Russell *vers.* Corne.

S. C. Salk. 119. 6 Mod. 127. cited Andr. 245.

IN trespass, assault and battery, brought by *baron* and *feme*, for the battery of the wife; there are several counts laid in the declaration, which are singly for the battery of the wife. But there is one count for beating her, *per quod negotia ipsius* the husband *infecta remanserunt*, and concludes *ad damnum ipsorum*. Upon not guilty pleaded a verdict was given for the plaintiff, and intire damages. Mr. *Mountague* took an exception in arrest of judgment, that the husband and wife cannot join, as this count is laid; for the wife cannot join for the damage accruing to the husband by the loss and delay of business, in which she has no interest.

In an action by baron and feme for the battery of the feme the declaration may charge under a *per quod* that the husband's business remained undone, and conclude *ad damnum ipsorum*. Vide 11 Mod. 264.

Serjeant *Darnall* for the plaintiff said, the *gist* of the action is the assault of the wife, and the *per quod*, &c. is only in aggravation of damages.

Holt chief justice. If it had been, *per quod consortium amisit*, the (*a*) wife could not have been joined.

Powell justice. There the *per quod*, &c. is the *gist* of the action, to intitle the husband to maintain an action alone without his wife. But now as this case is, I will not in-

(*) D. acc. 11 Mod. 265. ante 809. Cro. Jac. 538. pl. 6.

tend,

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tend, that the judge allowed any evidence to be given as to the special damage to the husband; but only admitted proof as to the battery.

(a) D. acc.
2 Sid. 346.

Holt chief justice. I remember a case, where an action of slander was brought by *baron* and *feme* for words spoken of the wife, *per quod* the husband lost his trade, and it was held, that if the words would maintain an action without the special damage, then they should have judgment; but if the words were not actionable without special damage, then (a) it was ill: for the wife ought not to be joined. See 1 Lev. 140. Suppose the husband was at charge upon this occasion, he may give it in evidence. Gould justice remembered the same case.

At another day Powell justice said, I do not know what they mean by saying, *per quod negotia sua insecta*, &c. a woman is to comfort her husband. In this case the *giff* of the action is not the *per quod*; but if the husband had brought the action, then it would have been the *giff*.

Gould justice. There was a case in this court Pasch. 7 W. 3. trespass was brought by the *baron* alone for breaking his house, and beating and wounding his wife, and imprisoning her for three hours, and also for detaining the possession of the house, and for menacing his wife and servants, *per quod negotia sua insecta remanserunt*. I moved in arrest of judgment, that for some of these wrongs, as the beating and imprisoning the wife, the wife ought to be joined; but judgment was given for the plaintiff by Eyre and Rokeby, *dubitante Holt*, for they held, that the *per quod* went through the whole count.

(b) R. acc.
Salk. 642.

Holt chief justice. An action of trespass may lie for a matter jointly with others, which could not be maintained singly. As a (b) man may have an action of trespass for entering his house and beating his servants, without saying, *per quod servitium amisit*, because the beating the servant is part of the same trespass, and only a description of it by way of aggravation. But if he lay it in another count, and at another day; it will be ill, without saying *per quod servitium amisit*. So a (c) man cannot maintain an action against another for assaulting his daughter and getting her with child; but he may maintain an action against another for entering his house and assaulting and getting his daughter with child *per quod servitium amisit*, and that is a great aggravation.

(c) R. acc. Burr.
1878.
Satterthwaite v.
Deerhurst. B.R.
E. T. 25 G. 3.

Let the plaintiff take his judgment *nisi*, &c.

Orchard *vers.* Ireland.

Jan. 28, 1703.

THE plaintiff brought an action of debt against the defendant upon a bond, conditioned for the payment of money at a day long since past. Upon which Mr. Raymond moved, that upon payment of principal, interest, and such costs as the master should tax, proceedings should be staid in this action. Mr. Mountague opposed it, because the defendant was indebted to the plaintiff upon a simple contract, to which the defendant threatened he would plead the statute of limitations, it being above six years since the debt was contracted, and no reviver since; and therefore since his motion was not a matter of right, but for a favour, and it was in the discretion of the court, whether they would grant it or not, he insisted, that if the defendant would have equity, he must do equity; and therefore hoped the court would not refer this action, unless the defendant would also wave his plea of the statute of limitations, or refer that cause of action to the master, as well as the other. But the court granted the motion, and said the debts were distinct, and the plaintiff by his own negligence had lost the simple contract debt, and it was not in their power to deprive the defendant of the benefit of the statute, which the law hath given him.

Proceedings shall be staid in an action upon a money bond on payment of principal, interest and costs, without compelling the defendant to waive the benefit of the statute of limitations in respect of a simple contract demand the plaintiff makes on him. vide Bl. 760. 4 Ann c. 16. s. 13.

Easter Term

3 Annæ reginæ, B. R. 1704.

Regina *vers.* Lane.

S. C. 6 Mod. 128. 3 Salk. 190.

An indictment for a positive offence must charge it to have been *contra pacem*. R. acc. Cro. Jac. 527. vide 11 Mod 53. Fort. 127.

MR. *Pengelly* moved to quash an indictment on the 5th of *Eliz.* for exercising the trade of a barber, not having been an apprentice seven years, &c. because the indictment did not conclude *contra pacem*.

Holt chief justice, *et cæteri* (a) *praeter Powell*, that there was no great reason for the exception.

Powell justice. Every act done contrary to the law is a breach of the publick peace.

The indictment was quashed.

(a) According to the report in 6 Mod. and 3 Salk. there the other judges agreed with *Powell*.

Smith *vers.* Airey.

S. C. 3 Salk. 14, 175. (b)

Money won at play cannot be recovered from the loser on an *indebitatus assumpsit*. S. C. 6 Mod. 128. *Holt* 329. R. acc. 5 Mod. 13. 12 Mod. 69, 81. Salk. 23. pl. 3. *Lutw.* 180. vide ante 69. R. cont. 2 Show. 92. vide 3 Lev. 118. 3 Salk. 175. pl. 3. On an *assumpsit* upon mutual promises, it may. D. acc. 10 Mod. 312. vide ante 69. and the cases there cited. Semb. acc. *Lutw.* 180. In a declaration of two counts, one is *assumpsit* for money won at play upon mutual promises, and the other in an *indebitatus assumpsit* for money won at the play aforesaid, the latter is bad.

(b) In 3 Salk. 14. This last is stated to have come before the court upon demurrer; but that could not have been the fact.

Holt

Holt chief justice said, that winning money at play did not raise a debt, nor was debt ever brought for money won at play, and an *indebitatus assumpsit* would not lie for it; but the only ground of the action in such cases, was the mutual promises. That though there were a promise, yet debt would not lie upon that. That he remembered a case brought before *Hale* in the exchequer, *Hardr.* 485. 1 *Vent.* 152. and the same case was brought again before him here, viz. an *indebitatus assumpsit* against the acceptor of a bill of exchange, and declared that he was indebted to the plaintiff in so much upon the acceptance of a bill of exchange; but it was held, that the action would not lie; and yet there was a promise in that case.

Mr. *Parker* in answer to the objection said, 1. That this must be tied to the first count, and the mutual promises must be taken in here, all one as if they had been repeated; and this play must be taken to have been upon the agreement, it being said *ad ludum prædictum*. 2. That after a verdict, it must be intended, that there were mutual promises; for the jury had found, that the plaintiff had won the money, which he could not do, except there were mutual promises. But *Holt* held, that the second count is a distinct independent declaration, and cannot be mended by the first; and that the other matter was but an implication.

Powell justice said, that it was adjudged in the exchequer chamber, that an *indebitatus assumpsit* would lie for money won at play: that that differs from the case of an *indebitatus assumpsit* upon a bill of exchange, because there the promise was raised by custom. But *Holt* said, that yet there was a promise.

Gould justice agreed, that there was such a case as *Powell* cited, adjudged in the exchequer chamber, but that in this court judgment had been arrested in such a case. And *Holt* said, that he had done it himself.

Darnall queen's serjeant said, that in a case in the common pleas, in which he was counsel, judgment had been arrested in such a case, upon debate; and the case cited by *Powell* in the exchequer chamber was cited in that case in the common pleas, and as he thought, the very roll brought into court. Which *Gould* justice agreed.

Then *Powell* justice said, that he only remembered, that there was such a case in the exchequer chamber, but that he thought the action could hardly be maintained. That that case in the exchequer chamber was before he was a judge, and that judgment must stay till it was moved of the other side.

If the defendant pleads three years' possession in stay of restitution upon an inquisition of forcible entry, according to 31 Eliz. c. 11. and it is found against him, he must pay costs, for the statute has given costs in express words.

AN inquisition of forcible entry found before a justice of peace in the country, was removed in the king's bench by *certiorari*. And in stay of restitution, the defendant pleaded possession by three years before the indictment found, according to the 31 Eliz. c. 11. And upon a traverse to the plea, it was found against the defendant. And now upon motion to the court by Mr. *Lechmere*, that the defendant ought not to pay costs in this case, the court upon view of the statute ordered the master to tax costs. And *Holt* chief justice said, that by the 8 Hen. 6. immediately upon the finding the inquisition of forcible entry, the justice was to award restitution, and the defendant had no plea to it. And now the statute of 31 Eliz. had given the defendant the plea of three years quiet possession in bar of restitution; but in case the plea was found against him, it had given costs in express words. As to the statute of 5 & 6 W. & M. c. 11. he did not take it to be within the statute, because the inquisition was not found at the sessions; but if it had been found at the sessions, and removed from thence by *certiorari*, the defendant must have paid costs by the statute.

Intr. Hil. 1 Ann.
B. R. Rot. 221.

Treviban *vers.* Lawrence.

Tho' a special verdict mistakes a fact, yet if the misstatement does not affect the merits of the cause, and the correcting it would let in a frivolous objection, it shall not be altered.

AN ejectment upon the demise of *Richard Vivian* clerk, and upon not guilty pleaded, the jury find a special verdict, that one *Stephen Robins* gentleman was seised in fee of the tenements in question; and being so seised, one *Humphrey May* in the year of our Lord 1656, in the court of upper bench, recovered a judgment for 127*l.* 1*d.* against the same *Stephen Robins*: and they find the record of the judgment in *hanc verba*, (a) Trinity term 1656, &c. and they farther find, that in Hilary term 13 Will. 3. a *scire facias* issued to the sheriff of *Cornwall* out of the king's bench, reciting, that whereas one *Humphrey May* in Trinity term 1656, in the court of upper bench, had recovered a judgment against *Stephen Robins* for 127*l.* 1*d.* and after the said *Humphrey* died intestate, and administration was committed to *Richard Vivian* clerk; and also the said *Stephen Robins* died seised of several lands and tenements in his demesne as of fee; it commanded the sheriff, to warn the tenants of all the lands and tenements in his bailiwick, of which the said *Stephen* was seised the 6th of June 1656, which was the

After a fact has once been judicially tried and ascertained, a party to the proceedings is estopped from denying its truth. 3. C. 6 Mod. 256. Salk. 276. 3 Salk. 157. If a *scire facias* is brought upon a judgment, and the issue of nul tiel record thereon found for the plaintiff, the record of the proceedings in the *scire facias* is conclusive evidence against the defendant in the *scire facias* of the original judgment. 3. C. 6 Mod. 256. Salk. 276. 3 Salk. 157. In an ejectment upon an elegit if the jury find a special verdict stating a judgment, a *scire facias*, an issue of nul tiel record, a judgment thereon for the lessor of the plaintiff, and an elegit, a variance between the judgment stated in the *scire facias*, and the original judgment stated in the verdict, shall not preclude the lessor of the plaintiff from having judgment. 3. C. 6 Mod. 256. Salk. 276. 3 Salk. 157.

(a) Note, The plea was of that term, but it being an issuable plea, it went down to the assizes, and the day in bank was tres Mich. at which day the plaintiff had his judgment. Note to the 1st Edition.

day

TREVIVAN
v.
LAWRENCE.

day of the judgment given, or ever since, to shew cause &c. the sheriff returned *scire feci* to Thomas Lawrence, &c. to be at W. &c. and that there were no other tenants of any tenements of Robins, which he had the day of the judgment given, &c. and the jury further find, that Thomas Lawrence, &c. appeared of that term, of which the writ was returned; and Vivian produced his letters of administration, *quæ commissionem administrationis prædictæ in forma prædicta testantur*, and prayed execution: the defendants pleaded, no such record of the judgment: the plaintiff replied, *quod habebatur tale recordum recuperationis debiti et damnorum prædictorum, quale per idem breve superius supponitur, prout per recordum inde inter recordat ejusdem curiæ de termino sanctæ Trinitatis, anno Domini 1656, Rot. 1036. in curia dicta nuper regis, coram ipso nuper rege tunc residens liquebat et apparebat*: and upon a day given to bring in the record, it was brought in, and judgment was given for the plaintiff, *pro eo quod videbatur eidem curiæ, quod habitum fuit tale recordum recuperationis debiti et damnorum prædictorum, quale per breve de scire facias prædictum superius supponitur*; that he should have execution against the defendant, and 6 l. for his costs: the jury further find, that the plaintiff at his prayer, and upon his election, had an *elegit* awarded, and upon that an inquisition was taken, and the lands in question extended, and delivered to the lessor of the plaintiff, to hold as his freehold, until the debt was satisfied: whereupon the lessor of the plaintiff entered into the lands in question, and made the lease to the plaintiff, *prout, &c.* and if for the plaintiff, for the plaintiff: and if for the defendant, for the defendant.

Note, That before the opening of the case Mr. Broderick of counsel with the defendant, complained of an irregularity in drawing up the special verdict, for that the *scire facias* and proceedings upon it were entered up as found in the special verdict different from what in truth they were. For that in the record of the *scire facias*, in the plaintiff's letters of administration there was the same fault committed, which was in the case of *Adams vers. the terre-tenants of Savage, ante 854.* which the plaintiff had now deprived the defendant of taking the advantage of, by entering the commission of administration generally, without saying by whom, but only that *post ejus mortem administratio, &c. cuidam Richardo Vivian clerico creditori principali prædicti Humfridi 8 Jan. anno regni nostri 13, apud St. Evall prædictum, debita legis forma commissæ fuit.* But because this objection ought to have been made at the drawing up, and settling the special verdict, and was now too late to be made; and because, though it was not according to the fact, yet it made no alteration in the merits of the cause, the court said, it should stand as it was. See the remainder of this case, post 1048.

Michaelmas Term

3 Annæ Reginae, B. R. 1704.

A Motion was made on the behalf of one, who had a grant of the office of chamberlain of the king's bench prison, to admit him to the office, the marshal refusing to let him have the exercise of it.

But *Holt* chief justice seemed to be of opinion, that the grant of the office was void, it being an incident inseparable from the office of marshal; because the marshal is responsible for the chamberlain's well demeaning himself, and consequently, though upon the grant of the office of marshal, the granting this office was reserved, such a reservation would be void.

But however, this was such an office as the court would not take any notice of, and therefore they denied the motion.

Regina *vers.* Franklyn.

An indictment may be preferred upon a penal law, to which 31 Eliz. c. 5. f. 5. extends after the expiration of 3 Salk. 357.

An indictment upon 5 Eliz. c. 4. for exercising a trade without having served an apprenticeship, may be preferred at the sessions of a borough. 3 C. Salk. 370. 6 Mod. 220. R. cont. ante 767. Vide 5 Eliz. c. 4. f. 39. Burr. 252. The

words "presentant existit" instead of "presentatum existit" in the caption of an indictment, makes the caption bad. 3 C. Salk. 370. 6 Mod. 220. Vide Cro. El. 103. pl. 3. And it cannot be amended after the term in which the caption was taken. Q. Whether on an indictment upon 5 Eliz. c. 4. the king shall have the whole forfeiture. 3 C. 3 Salk. 353.

MR. *Eyre* moved, to quash an indictment against the defendant for exercising the trade of a goldsmith, not having served seven years apprenticeship according to the statute, &c.

a year from the time when the offence was committed. 3 C. 6 Mod. 220.

First, Because by the 31 Eliz. c. 5. f. 5. all indictments, &c. upon penal laws, where a moiety of the forfeiture is given to the informer, must be exhibited within a year after the offence committed; and here it appeared upon the face of the indictment, that the offence was committed above a year before the sessions in which this indictment was found. But upon looking into the statute it appeared expressly, that the queen had two years to prosecute in such cases after the informer's year, and consequently this being an indictment, the exception was held to be frivolous.

Secondly,

Secondly, that this indictment was found at a sessions for the borough of *Portsmouth*, and by the same statute, *sect.* 7. these prosecutions are restrained to the quarter-sessions of the county. And for this two cases were cited, where indictments had been quashed for this reason; which the court agreed, but said, that since that, upon debate they had held an indictment upon this statute in a sessions for a borough to be well. (Note, the words of the statute are only, "and not in any wise out of the same county, where "such offence shall happen, or be committed.")

Thirdly, the caption was *presentant existit*, for *presentant*; and this being in another term was not amendable, and for this it was quashed. *Tuesday 24 October.*

Holt chief justice said in this case, that it might be a question, whether or no the whole forfeiture should not go to the queen, and she should have the whole 40 s. per month. If a statute inflicts a forfeiture of so much in a gross sum, and then distributes one part of the forfeiture of the queen, and the other to the prosecutor, if the prosecutor will sue, he shall have half, but if he will not sue, the queen shall have the whole forfeiture; for the statute makes the whole forfeited.

Purslow *vers.* *Baily.*

TO an action of trespass the defendant pleaded a *parol* submission to an award, and that the arbitrators awarded, that the defendant should provide a couple of pullets to be eaten at his house in satisfaction of the trespass, and avers, that he did provide a couple of pullets to be eaten at his house, and the plaintiff did not come. The plaintiff replied another award. And the defendant tendered issue upon it. And the plaintiff demurred.

menacement of the action, omitted giving the recompence within the time limited by the award. *S. C. Salk. 76. Vide ante 122. 247.*

Intr. Pasch. 3 Ann. Rot. 178.

The award of a collateral recompence under a *parol* submission is a bar to an action for the matter submitted, though the party against whom the action is brought, had before the com-

It was insisted by Mr. *Whitaker* for the plaintiff, first, that the award was no plea, at least not without performance. But secondly, if it were a good plea with performance pleaded, the performance here was not well pleaded, because he ought to have pleaded, that he gave the plaintiff notice of the time they were to be eaten; and also he had laid no *venue* where the performance was.

9 Co. 79.
Keilw. 120.
19 E. 4. 19.
46 E. 3. 17. b.
16 E. 4. 8.
1 Rol. Abr.
128.

Holt chief justice was of opinion, that the plea was good without performance, and therefore all the other exceptions

7 Hen. 6. 36.
2 Vent. 254.

[A party cannot object to the want of a *venue* in any pleadings to which he has pleaded over if his plea admitted the fact to which the *venue* was wanting. *S. C. 3 Salk. 381. Holt 717. 6 Mod. 231.*

PURLOW
BAILY.

(a) D. acc. ante
248. 965.

were out of the case. And though he agreed there was a difference in the old books, which Mr. *Whitaker* cited, between where money was awarded, and where a collateral matter; because the law was taken then, where a collateral matter was awarded the plaintiff had no remedy upon a *parol* submission to compel performance, as he had where money was awarded; for he might have debt for that: yet now he held the law to be otherwise, for as the law is now, the (a) party might have an action upon the case for the breach of his promise in non-performance of the award. For the submission is an actual mutual promise to perform the award of the arbitrators; and in such actions, while he was a practiser, and since he had been judge, the submission had been always held sufficient evidence to maintain the action. And if so, then it is within the same reason, as where a submission is by bond, and a collateral matter is awarded; or where, upon a *parol* submission, money is awarded; in which cases the award is a good plea without performance, in regard the party has a remedy to compel it.

Powell justice seemed to have a respect for the old difference, and yet allowed, that an action might be maintained upon a *parol* submission, upon non-performance (*quod mirum videtur*); but he held, that the performance was well pleaded.

But the court would not give judgment, but exhorted the parties to eat the pullets together; which they would have done at first, if they had had any brains.

As to the *venue*, *Holt* said, that was aided by pleading over, as if in debt on a bond no *venue* is laid where the bond was made, if the defendant pleads a release, this admits the bond, and aids the want of a *venue*, *Adjournatur*.

Davis *vers.* *Stannion*. Ante, 759.

A Writ of error of a judgment given in the *Marshalsea*, wherein the plaintiff declared, that whereas he the plaintiff *apud M. infra*, &c. had put his horse to the defendant, who was a common innkeeper, safely to keep him, and safely to re-deliver, *pro rationabili pretio* to be paid by the plaintiff to the defendant, he the defendant *eisdem die anno et loco adtunc et ibidem prædictis*, *spadonem prædictum tam negligenter custodivit, quod spado prædictus adeo graviter equitatus fuit et verberatus, quod totaliter spoliatus fuit, ad damnum*, &c. judgment was given for the plaintiff below. And now upon the writ of error this exception was taken, that it did not appear, that this immoderate riding and beating

beating was within the jurisdiction, which ought to have been precisely averred; for that the court would never intend any thing to be within the jurisdiction of an inferior court, that was not positively averred so to be; and wherever two matters were laid in a declaration as the foundation of the plaintiff's action, and one was laid to be within the jurisdiction, and the other not, that is ill. As in an *indebitatus assumpsit* if the promise is laid within the jurisdiction, but either no place is laid for the being indebted, or a place which is not averred to be within the jurisdiction, the declaration is ill. To which purpose there are many cases. So in an action on the case for calling the plaintiff whore, *per quod* she lost her customers, the words were laid to be spoke within the jurisdiction, but the loss of the customers was out of the jurisdiction, the action was held not to lie within the inferior jurisdiction. 1 Sid. 95.

All this was agreed by the counsel for the defendant in error; but then they insisted, that the immoderate riding and beating the horse was laid only in aggravation of damages, and if that special matter had been left out, the action would have well lain for so negligently keeping his horse *quod totaliter spoliatus fuit*. For this defendant being a common innkeeper, and having a reward for keeping this horse, he is according to the resolution of *Cogg's* and *Bernard's* case, ante 909. bound to keep and deliver the horse safely again, and is chargeable for not doing so, without shewing any special neglect. So that the defendant in this case is chargeable in an action upon the *non-feasance*, without the *mis-feasance* of immoderate riding and abusing the horse, which is put in only to induce the jury to give greater damages. And that the action would lie without the special matter, a writ was cited in the *Register* 110. b. where the allegation was only general, *quod* the defendant *tam negligenter, &c. custodivit, &c. quod equus multipliciter deterioratus fuerunt*, which could not be good, if a special damage were necessary to be shewn. And if that be so, then according to the agreed difference in all the books, though the matter, which is added in aggravation of damages, be out of the jurisdiction, yet the jury may well enquire of it, and it is well as long as the matter which is the *gist* of the action is alleged to be within the jurisdiction. Otherwise, if any part of the matter, which is necessary to maintain the action, be out of the jurisdiction. And to warrant this difference were cited 20 H. 6. 14. 37 H. 6. 2, 3. *W. Jones* 448. March 47. *W. Jones* 450. *Cro. Car.* 510. 1 Sid. 342. 2 Keb. 267.

To this it was urged for the plaintiff, that there must be a fact alleged, as an instance of the neglect and damage;

DAVIS
STANNION.

and such a general declaration, as had been put by the counsel for the defendant, would not have been good. And if that be necessary, there must be a place laid, where that special fact was done.

The court affirmed the judgment. And *Holt* chief justice said, suppose the declaration had been, that the defendant so negligently kept the horse, that he was taken out of the stable, and rode a journey into *Somersetshire*, *per quod* he was much damnified; yet the action might have been well maintained in that inferior court. For consider what sort of neglect this could be, it must have either been suffering the horse to be taken out of the stable, and then abused; or else suffering him to be abused in the stable; and which ever of these it was, the neglect was at the stable, in the jurisdiction by suffering the horse to be taken out of the stable; or more apparently if he were abused in the stable. So if the neglect was starving him, as I remember an hostler that used to grease the horses teeth, to hinder them from eating their oats. The default is at the stable.

Powell justice. The cause of action is laid well enough. It is a good declaration, leaving out the special matter, upon the neglect. If the declaration had been, as my lord chief justice has put the case, that the horse was rid into *Somersetshire*, and there beat, that is triable below; because the neglect is within the inferior jurisdiction, which is the letting the horse be carried out of the stable. This is only shewing the manner of the neglect.

Upon a former argument of this case *Holt* chief justice said, that if that declaration had been here, the defendant could not have demurred, because no *venue* was laid for the immoderate riding. He said also, that the case of the taylor in *Jones* and *Croke* differs from this, because there the words were actionable of themselves, and so the other matter merely laid in aggravation of damages. At the same time *Powell* justice said, that the case of the *indebitatus assumpsit* differed; because both the being indebted and the promise, are necessary to maintain the action. And so in trespass by the master for beating his servant, *per quod servitium amissu*; because (a) the *per quod* was necessary to maintain the action. But here the *gist* of the action is only the neglect, though the plaintiff must shew how he is damnified.

(a.) Vide ante
489. and the
cases there cited.

Mr. Raymond and Mr. Chesyre for the plaintiff in error;
Mr. Ward and Mr. Mountague for the defendant.

Robert *vers.* Harnage.

S. C. Salk. 659. 6 Mod. 228.

IN an action of debt upon a bond, the plaintiff declared in common form, *quod cum* the defendant such a day, &c. *apud London in parochia beatae Mariae de arcubus in warda de Cheape per scriptum*, &c. *cognovit se teneri*, &c. *solvendum eidem* the plaintiff, &c. Upon *oyer* the bond was set out, and was thus (as far as concerned the present question) *viz.* the *solvendum* was to the lawful attorney of the plaintiff, or his assigns; and the bond concluded thus: sealed with my seal, and dated in *Fort St. David's* in the *East Indies*, such a day, &c. After *oyer* the defendant pleaded the variance in the *solvendum* in abatement, and the plaintiff demurred.

A bond by which the obligor acknowledges himself to be bound to the obligee in a sum to be paid to the lawful attorney of the obligee, or his assigns, may be described as a bond by which he acknowledged himself to be bound to the obligee in a sum to be paid to him.

As to the variance mentioned in the plea, Mr. Broderick said, that by the first words of *Noverint*, &c. *me J. S. teneri*, &c. *J. N.* there is a debt sufficiently raised to *J. N.* and though the *solvendum* be to *J. S.* as the book of 4 *Edw.* 4. 29. is, or to a stranger, as the case is in 1 *Sid.* 295. 2 *Kemble* 81. or as it is here, to the attorney, or assigns of the obligee, the *solvendum* is void. And by the first words the debt is created, and consequently the money payable to *J. N.* 4 *Edw.* 4. 1 *Sid.* and 2 *Kemble*, *ubi supra*, which was agreed by the court. And besides *Holt* said, that payment to his attorney, or to a person appointed by him, is a payment to himself, and so that was well enough.

If a bond bears date at any place abroad, it must in a declaration upon it be stated to have been made at that place.

Then Mr. Parker shewed another variance, *viz.* that the bond was dated at *Fort St. David's* in the *East Indies*, but the declaration was upon a bond, dated *apud London*, &c. and so not the same bond.

Mr. Broderick said, that the place was laid as a *venue*, and not as the place of making the bond.

Holt chief justice. Always where a bond has a place of date mentioned in the bond, you must make your declaration agree with it. Here the bond is mentioned to be dated at *Fort St. David's* in the *East Indies*; therefore in your declaration you should have said, that the defendant *apud Fort St. David's* in the *East Indies*, *viz.* *apud London in parochia beatae Mariae de arcubus*, &c. *per scriptum*, &c.

Powell justice. Dating a bond makes it local. You should have declared, that the defendant *apud Fort St. David's*, &c. *ut supra*.

The

ROBERT
v.
HARNAGE.

The court gave Mr. *Broderick* time to try if he could make it good. But he the next day despairing to make it good, moved to abate their own writ for expedition. And it was abated accordingly.

Wells *vers.* Osman.

S. C. 6 Mod. 238.

Seamen hired to fit a ship for sea and go a voyage in her, may sue in the admiralty for the wages they earn in fitting her out, tho' she does not proceed upon the voyage. S. C. cit. 2 Will. 265.

Seamen may sue in the admiralty for their wages, tho' they were not hired by the owner, if he permit them to go on board.

UPON a motion for a prohibition to the admiralty, in a suit there for seamen's wages, the case appeared to be thus. *Wells* the plaintiff built a ship and launched her, and after upon a treaty between him and one *Barell*, who was to buy the ship of him, in order to get to be master of her (as is usual in such cases) but before any bill of sale executed by *Wells* to him, *Barell* hires *Osman* and other seamen to launch and rig the ship, and to go with him in this ship a voyage proposed, and sends them aboard the ship, and *Wells* (a) permits them to come aboard; and there the seamen continued for four months, fitting the ship out to go to sea: but after, upon some difference between *Barell* and *Wells*, the treaty for the ship was broke off, and the things fetched from shipboard, and the seamen discharged, having never been with the ship any lower than *Deptford*, where the ship lay when they went aboard. And now the seamen libelled in the admiralty against the body of the ship for their wages, and upon a suggestion that the work and labour was done *infra corpus comitatus*, Mr. *Eyre* and Mr. *Whitaker* moved for a prohibition. And they grounded their motion upon this, that though here was a voyage intended, yet no voyage having been made, the mariners could not sue in the admiralty for their wages. For the reason of the jurisdiction of the admiralty is, because the suit is for wages for work and labour done upon the high sea, and that reason is given in 3 *Lev.* 60. which fails here, where all the work was done in the river of *Thames*. And that this was like the case of tackle bought in the river *Thames*, in which case in a suit in the admiralty against the body of the ship, a prohibition was granted. 3 *Keeble* 552. But yet such a contract made upon the high sea, is within the admiralty's consuance. It was objected also, that this was the common course of dealing between the ship-builders and the masters of ships; and that it would be very hard to subject the builders of ships to the seamen's wages, where the contract never proceeded, the builder having nothing to do with the seamen; but they should be put to their remedy against the master who contracted with them.

(a.) According to the report in 6 Mod. Wells put Barell in possession of the ship.

Holt

Holt chief justice. Suppose a master of a ship designs to go a voyage, and hires and takes aboard seamen in order to it; afterwards the owners cannot agree about sending the ship the voyage, and upon that the seamen are discharged; shall not the seamen have the same remedy for their wages, they should have had, if the ship had gone the voyage? The reason of the admiralty jurisdiction is, because they are mariners, and they are equally entitled to their wages, as if they had gone the voyage, and therefore it is plain they shall have the remedy against the ship, in that case, for their wages. Then the matter is, if it makes any difference, that the ship was not sold to owners, but was still in the builder's hands. The builder permits the intended master to put seamen on board, and then he and the buyer differ; shall that take away the seamen's remedy? No. The builder, by permitting the seamen to be put on board, consents to the charge upon the ship, and by his own act makes it liable to the wages. And there is no reason to consider the builder, for when he trusts the contractor so far as to let the seamen go aboard, there is no reason to help him. The ground of this proceeding in the admiralty is usage time out of mind.

Powell justice. It is clear, that seamen taken on board a ship in order to a voyage, though the voyage never proceeds, are equally intitled to their wages. And there is great reason why they should have this remedy, because (a) in the admiralty the body of the ship is liable, and the seamen may join in action. They are hired for such a voyage, and they look no farther, they do not concern themselves with the property of the ship, nor are privy to the bill of sale, or any other matters between the master and the builder; and therefore it would be hard for anything that passes between the master and the builder to take away their remedy. And besides, the builder might have taken security to be indemnified before he let the seamen come aboard his ship, and by that means subjected it to a charge.

Besides, *Holt* chief justice said, that upon the libel the matter appeared to them to be for seamen's wages, and proper for the admiralty jurisdiction; and if the defendant below had any matter to plead, he might appeal. This was as to the defendant *Wells*'s property being not bound, as was pretended, to pay the seamen's wages.

The motion was denied. Mr. *Dy* counsel for the defendant.

Wells

OSMAN.

(a) Acc. Sale:
33 pl. 4. a Will
265.

Intr. Trin. 3
Ann. Reg. B.R.
Rot. 54.

Davenant *vers.* Raftor.

To the plea of a release of errors if the plaintiff replies that there was another judgment of the same tenor with that upon which the writ of error is brought, and that the release applied to that, he ought to set it out at length. S. C. 6 Mod. 235.

Q. Whether a traverse that it applied to that upon which the writ of error is brought, is good, vide ante 443, and the other books there cited.

If the plea of a release of errors states that the plaintiff released the errors in the judgment upon which error is brought, it need not allege specially that the judgment mentioned in the release is the same with that on which error is brought.

The plea of a release of errors ought not to pray a judgment of affirmance. Vide Str. 127, 483. 1 Show. 50.

Then Mr. Salkeld took an exception to the plea, that it was *relaxasset*, which happened a time past, and might be seven years ago before the judgment. But to that the court answered, that it was *per factum suum datum* such a day *relax-*

But if it prays judgment if the plaintiff ought to prosecute his writ of error, and that the judgment may be affirmed, the prayer of affirmance shall be rejected as surplusage. S. C. 6 Mod. 235. If the defendant in error pleads a release of errors, and the plaintiff admits it, judgment shall be given for the defendant without any examination of the errors. S. C. 6 Mod. 235. vide ante 1005, 1006. Tho' the operative words of a deed are in a past tense, they shall have the same effect as if they had been in the present, unless the time from which they shall operate is expressed in the deed. A judgment in the common pleas upon demurrer for so much debt, and so much damages for the detention of the debt may be described as a judgment for so much debt, besides costs of suit. S. C. but with some difference 6 Mod. 235. 3 Salk. 214.

asset,

A Writ of error of a judgment in the common pleas, in an action of debt upon a bond for 600*l.* and want of an original assigned for error; but the plaintiff in error had not taken out a *certiorari*, and got the want of the original certified. The entry of the judgment was, *quod querens recuperasset debitum prædictum et damna occasione detentionis debiti illius ad, &c.* The defendant in error came in *gratis*, and pleaded, that the plaintiff *per scriptum suum, &c. datum* such a day (which was after the judgment) *remisisset, relaxasset, &c.* the errors in the judgment. The plaintiff craved *oyer* of the release, and upon *oyer* it appeared to be a release of all errors, &c. in a judgment for 600*l.* debt, besides costs of suit. And after *oyer* he replied, that there were two judgments against the plaintiff for the same sum, and that this release was given of the errors in the other judgment, *absque hoc*, that it was given of the errors in the judgment in question. And to this there was a demurrer.

The court held the replication naught, because the plaintiff did not in his plea set forth the record of the judgment special, as of what term, &c. but pleaded generally, *quod fuero duo iudicia, &c.* And Holt chief justice held, that the traverse too was naught, being a traverse of an intent, like the traverse of the *veritate ejus* in 1 Saund. 20, 21. Bennett v. Fikins. But that the plaintiff ought in his replication to have pleaded the judgment at large, and that the release was of that judgment, *et hoc paratus est verificare.* But Powell justice held, that it was a good traverse, for that nothing else could be traversed in this case, but the intent of the release. And *quære per Salkeld* as to the opinion of Holt; for what would have been the difference, for the defendant could have only rejoined, that it was a release of the judgment in question, *et hoc petit quod inquiretur per patriam*, and then the intent of the release must have been tried?

Then Mr. Salkeld took an exception to the plea, that it was *relaxasset*, which happened a time past, and might be seven years ago before the judgment. But to that the court answered, that it was *per factum suum datum* such a day *relax-*

asset, which tied it down to that day, which was after the judgment.

DAVENANT
v.
RAPTOR.

Then he took another exception, that there was a variance between the judgment recited in the release, and the judgment upon which this writ of error was brought; for that the judgment recited in the release was a judgment for 600*l.* debt, and costs; and the judgment before the court was for 600*l.* debt, and damages *pro detentione debiti*. He agreed, if it had been *damna* generally, it would have been well; because *damna* signifies costs, but here the sense was determined to damages, by adding the words *pro detentione debiti*, and excluded costs.

But to this it was answered and agreed by the court, that the constant form of entries of judgments in debt upon demurrer in the common pleas was thus, and that they gave costs by the name of *damna pro detentione debiti*, and that the court would take notice of the form of entries in that court; though in case of judgments after a verdict in debt in that court, and in case of judgments either upon demurrer, or after a verdict, in debt in this court, the entry is *debitum suum prædictum necnon — libras pro damnis suis que sustinuit tam occasione detentionis debiti illius, quam pro misis et custagiis suis, &c.* (Note, This seems to be the most proper entry.)

Ex relatione magistri Salkeld counsel with the plaintiff in error. And note, that he said, that there was another great fault in the replication, which was not seen by Mr. Eyre, viz. that the pretended judgment was pleaded as a judgment *versus prædictum Willielmum*, whereas the name of the plaintiff in error was *Robert*.

Holt chief justice said also, that there was no variance, for the words of the release are only 600*l.* besides costs of suit, which do not affirm positively, that there were any costs of suit, nor can it be necessarily inferred from them.

Mr. Eyre said, that admitting the variance in the release, yet the court could not reverse the judgment without examining the errors, and that the want of an original was not well assigned. For that to make the assignment of that error compleat, the plaintiff ought to take out a *certiorari*, and get the want of the original returned, and so satisfy the court, that there was no original.

To which *Holt* chief justice answered, that indeed true it is, that where the want of an original is assigned for error, the course is for the plaintiff in error, before he can bring in the defendant to plead to the errors, to sue out a *certiorari*, and get a certificate, that there is no original.

But

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But if the defendant will come in *gratis* without process, and plead a release, he confesses the error; and if there be an original, he must take out a *certiorari*, and get it certified; or else it shall be taken that there is none, and the judgment reversed.

The judgment was, *quod* the plaintiff *nil capiat per breves, nisi, &c.* within a fortnight.

See this case stirred again, and some exceptions taken, and the case stated from the record. *Post.* 1052.

Treviban *vers.* Lawrence.

SEE the state of the case. *Ante*, 1036.

It was argued on the behalf of the plaintiff in the ejectment, that the judgment in the *scire facias* made such an alteration, that it put the original judgment out of the case, and was of itself without that a sufficient title for the plaintiff: and therefore, though the judgment, which they had given in evidence, did vary from the judgment recited in the *scire facias*; yet the producing the original judgment not being necessary to maintain the title, that variance would not be material, and that the judgment in the *scire facias* did make an alteration. It was urged that the (a) *scire facias* was not a mere writ of execution, but was in nature of an action, and came in lieu of a new original; and therefore to authorize the plaintiff's attorney to sue out a *scire facias*, he must have a new warrant, otherwise of suing out a writ of execution. And so is the case in 3 *Oro.* And a release of all actions is a bar to a *scire facias*, otherwise of an execution. *Lit. sect.* 503. and the case in 34 *Hen. 6.* pl. 48. was cited, where in replevin by lessee for years, the lessor avows, that an *elegit* issued, reciting a judgment, and how the plaintiff had prayed an *elegit*, and that upon it the sheriff delivered the defendant the lands in question, by virtue of which the avowant was possessed, and being so possessed demised to the plaintiff for years rendering rent, and for rent arrear, &c. And upon exception this avowry was held to be good, without shewing the judgment. So here, the judgment in the *scire facias* is a sufficient title to the plaintiff, without shewing the original judgment.

Secondly, It was urged, that this was no variance, because, where the record is between the same parties, and for the same matter, upon the issue of *nil tial record*, a variance in the day is not material. *Hob.* 109. 2 *Roll.* 576. 38 *Edw.* 3. 17. *Bro. failer de record.* 2. and 15.

Thirdly,

(a) Acc. 1 Will.
99. 2 Will. 51.
Bl. 1227. 1
T. R. 46, 268.

Thirdly, The judgment of *Mich.* 1656, which is found *in hæc verba* in the verdict, is not by any thing found in the verdict, affirmed to be the record, on which the *scire facias* was grounded.

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Fourthly, The terre-tenants, among whom was the defendant, having been returned, warned on the *scire facias*, and having appeared and pleaded *nul tiel record*, and that tried against them, are now estopped, to say there is no such judgment of *Trinity* term, 1656.

Mr. *Broderick* for the defendant argued, that there was no title found for the plaintiff, for that the foundation of the plaintiff's title was the judgment, and that the recital of such a judgment in the *scire facias* was not a sufficient evidence, that there was such a judgment, but that the original judgment ought to be produced, and not only the record of the *scire facias*, and judgment thereupon. And for that he cited 2 *Keb.* 499. and wherever a man is to make a title to himself, the recital of one record in another is not a sufficient evidence, that there is such a record, without producing the original record.

Secondly, The judgment here found is of another term, which is going a step farther than bare not producing the original judgment. And though upon the issue of *nul tiel record*, there is such a judgment adjudged to be as is recited in the *scire facias*, viz. of *Trinity* term 1656, that will not estop the defendant, because there are other defendants, who must be bound, and turned out of possession by this estoppel (for if execution go it must go against all the terretenants) who are strangers to the judgment in the *scire facias*.

Thirdly, The judgment in the *scire facias* makes no alteration. If an executor brings a *scire facias* on a judgment, or a recognisance, and gets a judgment *quod habeat executionem*, and dies intestate, the administrator *de bonis non* must bring a *scire facias* upon the original judgment, and cannot proceed upon the judgment in the *scire facias*. The difference is, that (a) sheriffs and officers need not plead the judgment, for they are to look no further than the process, which comes to them, which they are to execute, and not to take upon them to judge, whether it be legal or no, but the party himself must plead the judgment.

(a) D. acc. 3
Will. 376. vide
3 Will. 345. Bl.
868. ante 733.
and the books
there cited.

Holt chief justice. The case of 34 *Hen.* 6. is nothing to the purpose, for there was a demise shewed to the lessee, which (b) was all that was necessary to be shewn, being an avowry against his own lessee, and all the rest is impertinent.

(b) Sed vide
ante 331.

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ment. It is a sufficient commencement of a particular estate, in an avowry upon his own lessee; but it may be a question, whether it would have been good, if it had been an avowry for rent by tenant by *elegit* of a reversion, against a lessee by a lease prior to his title. [Note, this is the reason the book goes upon, because the lessee is estopped by the lease to plead *nil in tenementis*, and so consequently the lessor's title is not in question.]

Holt chief justice. If the lease depended upon the variance, it is certainly a variance. For the judgment hath a different relation, and the charge in case of the one extends much farther then the charge in case of the other; the one charges all the lands, of which the defendant was seised the sixth of June 1656. the other those only, of which he was seised the twenty-third of October 1656. and the inquiry is different.

But the question is, if the defendant is not for ever concluded. For the judgment is set forth in the *scire facias*, as a judgment of Trinity term, and the terre-tenants have pleaded, *nul tiel record*, and the issue is tried against you, and it is entred on the roll, *quod habetur tale recordum*: can you falsify this in the point tried? There is no need in this case for the plaintiff to shew any judgment, because upon issue upon *nul tiel record* it is found that there is such a judgment, and the defendant can never say, that this was not the judgment against him, but that it was another judgment; because it is determined already against him, that there is such a judgment against him. As the issue in tail shall never falsify a verdict in a real action, in the point tried; but he may say, that there was some matter omitted. As put case in any real action, there was a verdict against tenant in tail, the issue in tail can never falsify this verdict in the point tried directly, but only in a special manner, as by saying that some evidence was omitted, &c.

The judgment in the *scire facias* does alter the matter, as in the case of *Obryan and Ram*, 3 Mod. 186. where judgment was obtained against a *feme sole*. She marries; then the plaintiff sues a *scire facias* against husband and wife, and has a judgment *quod habeat executionem* against both. Then the wife dies, and the plaintiff sues out a *scire facias* against the husband, and has judgment *quod habeat executionem* against him, and resolved to be well, upon a writ of error out of Ireland: and so *vice versa* (in the case of *Woodyer* against *Gresham*, Mich. 9 Will. 3. B. R.) Salk. 116. a *feme sole* recovered a judgment, and then took husband, and the husband and wife sued out *scire facias*, and had judgment *quod habeant executionem*, and then the wife died, and the husband brought a *scire facias*, and had execution.

The

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&
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The case of *Tilborne vers. Rag* in 1655. 2 Sid. 12. cited ante 590. was thus: the defendant in a judgment was tenant in tail, and died, and upon a *scire facias* against the heir and terre-tenants the issue in tail was returned heir and terre-tenant, and warned, and judgment was given against him by default, and the intailed lands were extended upon an *elegit*; and upon an ejectment brought by the tenant by *elegit*, the deed of intail was given in evidence, and all this matter specially found. And it was resolved, because the defendant had an opportunity to have pleaded this once to the *scire facias*, and had not pleaded it, he was estopped to say it now; and so a judgment that did not bind the issue in tail at first, was by his neglect of pleading his title to the *scire facias* made an unavoidable charge upon him. And that resolution was founded on the book of 39 Aff. 18. where the estoppel is of such a nature, as that it creates an interest in, or works upon, the estate of the land, there the jury are estopped. If this case had been in special pleading, and the plaintiff had (a) declared in debt upon a judgment of Trinity term 1656, and the defendant had pleaded *nul tiel record*, if the plaintiff had replied, *quod habetur tale recordum*, he had been gone; but if he had replied this *scire facias*, and all the proceedings upon it, and concluded his replication upon the estoppel, the defendant had been concluded. So upon a demise by indenture, by one who has nothing in the land, if the lessor brings debt for rent, and (b) declares upon the demise, and the defendant pleads *nihil habuit in tenementis*, if the plaintiff replies that he had a sufficient estate whereout to make the demise, he (c) has lost the benefit of the estoppel; but if he replied that the lease was made by indenture, and concludes, *unde petit iudicium*, if he shall plead this plea against his own acceptance of the lease by indenture, there the (d) defendant shall be estopped; but if the defendant had pleaded *nil debet*, the plaintiff might have taken advantage of the estoppel upon evidence, because the pleadings are not brought to such a point in the case, as to give the plaintiff an opportunity of replying the estoppel.

(c) D. acc. post
1054.(d) D. acc. post
1051.

Powell justice. Here the issue is tried by the record, and here is the judgment of the court, *quod habetur tale recordum*, and you and all that claim under you are estopped by this, to say there is no such judgment. And as to the other defendants you speak of, we must take it, that all these either were defendants, in the *scire facias*, or claim under them that were, because all the lands must be taken to have been extended upon the *elegit*. The law is clearly with the case of *Tilburn and Ragg*, if *scire facis* is returned, and the heir in

(a) Note, Holt chief justice said, the plaintiff in such a case as this might declare upon the judgment in the *scire facias*. Note to the first edition.

(b) Note, this case must be intended of such proceedings against the original defendant, *quod eam dimisit generally*; without mentioning that the demise was by indenture. Note to the first edition. Vide post §§ 594. 595. Str. 817. 2 Lev. 146.

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tail omits his time of coming in and pleading, and lets judgment go by default.

This term the case came on again in the paper, and after opening the case only by Mr. King for the plaintiff, nobody offering to argue for the defendant, judgment was given for the plaintiff.

The judges said but little, as I was informed, for I could not hear where I sat, and what they did say was to the same effect with what had been said before, and all agreed to give judgment upon the point of the estoppel. *Powys* justice cited the case of *Day* *vers.* *Guildford*, 1 *Lev.* 41. (which is a case of the same nature with that of *Tilburn* *vers.* *Ragg*) where tenant for life, the reversion to his son and heir in fee, acknowledged a statute, and the heir let judgment go by default, &c. as in that case.

Note; Mr. *Broderick* in his argument in *Easter* term cited a case between *Manaton* and *Norris*, 34 *Car.* 2. but what it was I know not.

Holt said to it, that in that case the award was joint and several.

Davenant *vers.* Rafter. Ante 1046.

Error.

Fault of original.

Release of errors
pleaded.

ERROR of a judgment in the common pleas, in an action of debt upon a bond of 600*l.* and judgment by *nil dicit*, quod the plaintiff *recuperet* *versus* the defendant *debitum suum praedictum et damna sua occasione detentionis debiti illius ad 50 solidos eidem the plaintiff ex assensu suo per curiam hic adjudicata, et the defendant in misericordia.* The plaintiff in error in *propria persona* assigns for error the want of an original, &c. *et super hoc* the defendant in error *similiter venit* by attorney, and prays *oyer* of the writ of error, which is entered in *haec verba*, and then pleads, quod the plaintiff *praedictum breve de errore prosequi seu manutenere non debet*, because after the judgment, and before the writ of error sued forth, viz. 10 February 1703 at London, in the parish of St. Mary le Bow in the ward of Cheap, the plaintiff *per nomen*, &c. *per quoddam scriptum suum relaxationis*, &c. *gens datum* the same day and year, *remisisset, relaxasset, et in perpetuum quiete clamasset* to the defendant *omnes et omnimodos errores*, &c. *habitos, factos*, &c. *in, circa, tangentes seu concernentes iudicium praedictum, seu in, circa, tangentes suos concernentes aliqua warranta*, &c. *quascunque de vel aliquo modo concernentia idem; et hoc paratus est verificare, unde petit iudicium, si praedictus the plaintiff breve de errore praedictum prosequi aut manutenere debeat, et quod idem iudicium in omnibus affirmetur.* The plaintiff craves *oyer* of the release, and it is entered in *haec verba*, and purports a release by the plain-
tiff

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tiff to the defendant of all and all manner of errors, &c. had, made, &c. in, about, touching or concerning one judgment obtained against the plaintiff by the defendant this present Hilary term for 600*l.* debt, besides costs of suit, or in touching or concerning any warrant, &c. whatsoever, of or any way concerning the same; In witness, &c. the 10th of February 1703. And then replies, *quod* the defendant in the same term of St. Hilary in the plea of the defendant mentioned *duo judicia de simili summa et causa actionis versus eundem* the plaintiff obtinuit, and that the plaintiff the aforesaid deed of release *superius recitatum non dedit, nec intens. inter eos fore dat. fuit, tempore sigillationis ejusdem*, of the errors, &c. *de et circa judicium prædictum*, of which he has now brought his writ of error, *sed de alio judicio sic ut præfertur obtent. absque hoc, quod* the plaintiff remisit, relaxavit, &c. to the defendant *omnes et omnimodos errores, &c. in judicio prædicto modo et forma prout* he has alleged, *et hoc paratus est verificare; unde* the plaintiff *ut prius* says, *quod in recordo, &c. manifeste est erratum, allegando errores prædictos superius per ipsum allegatos; and prays, quod judicium prædictum ob errores prædictos, et alios errores in recordo et processu prædictis compertos, revocetur, &c.* And to this the defendant demurs, and the plaintiff joined in demurrer.

Note, the *placita* was, *Placita irrotulata apud Westmonasterium coram Thoma Trevor, &c. justiciariis dominae reginae de banco de termino sancti Hilarii, anno regni dominae Annae Dei gratia Angliae, &c. secundo.*

Mr. Broderick moved on the rule for judgment *nisi*, and took this exception to the plea, that the defendant in the conclusion of his plea prays that the judgment may be affirmed, whereas he ought to conclude it upon the estoppel, if the plaintiff *manutene* seu *prosequi* debeat his writ of error against the defendant contrary to his own deed of release. And so is the entry in Sir William Pelham's case, 1 Co. 14. a. and 21 Edw. 4. 43. another entry accordingly. (Note; in the book of Edw. 4. there is no *contra scriptum*, nor *breve*, but it is pleaded to the errors.) For the court upon this plea cannot affirm the judgment, but can only award a *nil capiat per breve* as they have done in this case. And it is a general rule, that (a) wherever the defendant by his plea demands such a judgment as the court cannot give, the plea is ill. And upon that foundation the case of *Bisse vers. Harcourt, Carth. 137. 3 Mod. 281. Salk. 177.* was ruled, where in *assumpsit* the defendant pleaded in abatement an attainer in the plaintiff, and the plaintiff replied a pardon, and concluded his replication, *unde petit judicium et damna, &c.* and that was held to be a discontinuance, for he ought not to have concluded in bar, but only have affirmed

(a) Acc. ante
338. and see the
books there
cited.

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(a); for the matter of the replication being triable by the record, and not by the country (in which case only upon a plea in abatement after trial had the plaintiff can have final judgment) the plaintiff could have only a *respondes ouster*. To this it was answered and resolved by the court, that the beginning of the plea, and the conclusion of it, till you come to those words, *et quod idem judicium, &c.* was proper and right, and therefore the addition of those words was but superfluous, and that should be rejected. And *Holt* and *Powell* said, that the plea was a (b) bar of the writ of error; and *Powell* said, he wondered how Mr. *Broderick* could fancy it was an estoppel. *Holt* said, that where in debt for rent the plaintiff counts on a demise, and does not say by indenture, the defendant pleads *nil habuit in tenementis* the plaintiff may reply the demise was by indenture, and demand judgment, if against that the defendant shall be admitted to plead the plea (c) it is a good replication, and the defendant is estopped. But if in that case the defendant had replied an estate, and gone to issue, on evidence the (d) issue might have been against him, because he did not rely on the estoppel in pleading; but here this release is not an estoppel, but a bar.

(c) D. acc. ante
3051.

(d) D. acc. ante
3051.

Then Mr. *Broderick* took another exception, that it was not averred any where in the plea, that this judgment, of which the writ of error was brought, was the same judgment, the errors in which were released, except only in the body of the pleading of the release, as if there was such an averment in the release itself, which was naught: for no issue could be taken on that; but there ought to have been a distinct averment of that, either in the end of the plea, as you see it often in pleas of recoveries in other actions, &c. or else after the words, *de et concernen. judicium prædictum*, the defendant should have added, *existens idem judicium*, of which the plaintiff has now brought his writ of error; and so upon that averment issue might have been taken.

Holt chief justice said, there was never such a form of pleading. And *Powell* said, it was better this way.

Holt chief justice. The plea is good now after the release is set out upon *oyer*, for now it appears to be a release of this judgment, and it shall not be intended that there was another judgment between the same parties of the same term. And your replication is not good; for if there were another judgment, to which this release might be applied, you should have pleaded it specially and certainly, and have averred, that this release was a release of the errors in that judgment, and so have given the plaintiff an opportunity of

(a) This was not said by Mr. *Broderick*, but I report it as the true ground of the case of *Bills v. Harcourt*, as I have often heard it from the chief justice. *Note in the first edition.*

(b) The words *Holt* used were "Discharge of the errors." *Note to the first edition.*

answering

answering that judgment, as by pleading *nul tiel record*. For if there be no such record, the very foundation of your replication is gone; for if there be no other judgment, this release releases this judgment, and the traverse is of a thing in the air.

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Mr. Eyre said, that there was a precedent in *Rassal*, where a release of errors was pleaded, and the conclusion of the plea was as this is. But the court agreed it was not the proper way of pleading.

The court would not alter the rule.

Copley *vers.* Delaunoy.

IN an action of debt upon a bond in the common pleas, the plaintiff declares, *quod cum* the defendant at *London*, &c. *per quoddam suum obligatorium*, &c. omitting the word *scriptum*. The defendant prays *oyer* of the bond, and it is entred in *hæc verba*, and pleads in bar, that the plaintiff had not specified the bond according to the act of parliament, and the plaintiff demurred.

A matter which destroys the right of action but for a time only, cannot be pleaded in bar.
R. acc. post 1249.

Mr. serjeant *Whitaker* moved the court upon the rule for judgment for the plaintiff, *nisi*, &c. that this was a good plea in bar, for it was a temporary bar. Like the case of an outlawry, which is a good plea in bar in an action of debt. And as in this case, after the time limited in the act of parliament, or that the plaintiff has paid the penalty, he is entitled to sue again; so in the case of an outlawry, after a pardon, or reversal of the outlawry by writ of error, the party is restored to his action. And yet the judgment upon the plea in bar is final to the plaintiff in that case, as well as in this; and therefore this may as well be pleaded in bar as that. Secondly, if this be no plea in bar, yet now by the demurrer the plaintiff has confessed, that he has not specified the bond, and therefore the court cannot give judgment for him; for by the express words of the act of parliament the debt is not recoverable. Thirdly, the declaration is naught, for the omission of *scriptum*; for the debt cannot be raised without deed.

A demurrer admits nothing but what is well pleaded.

R. acc. post 1243. 1550.
D. acc. post 1173. Vide ante 18.

If matter which ought to be pleaded in abatement only, is pleaded in bar, a demurrer will not admit it.

R. acc. post 1243.

Serjeant *Selby*. That the reason of the case of outlawry is, because the debt is forfeited to the crown, and so the plaintiff had no right of action, which distinguishes it from this case. But that according to *Ferrar's* case, if this plea be a good bar, it must be a perpetual bar, which it is not by the act of parliament, and therefore it is no plea in bar. As to the third objection, he said, that the bond being set out upon *oyer*, it did now sufficiently appear to the court,

In a declaration upon a bond 'tis sufficient to state that the defendant *per quoddam suum obligatorium cognovit* in *testari*, without inserting the word *scriptum*

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that there was such a bond, and that made the declaration good.

Trevor chief justice. This matter cannot be pleaded in bar, for it is a temporary bar, and that is but a plea in abatement; and that is the difference between a plea in abatement and bar.

Tracy. The words are, the debt shall not be recoverable, but yet the right of action remains. The difference in the case of outlawry in the plaintiff, where it shall be pleaded in abatement, and where in bar, makes this matter plain. In trespass, and other actions where the damages are uncertain, and consequently the right of action not forfeited, there (a) outlawry can be only pleaded in abatement; because, though the plaintiff is under a disability of suing, yet the right of action remains in him. Otherwise in debt, *assumpsit* for a sum certain, &c. there the debt being forfeited to the crown, the plaintiff has no right of action in him, and therefore in (b) those cases outlawry may be pleaded in bar. But the proper way of pleading this is, with a *si responderi debeat quousque*, &c.

(a) Acc. Gilb.
C. B. 200, 201.
Co. Litt. 128. b.

(b) Acc. Gilb.
C. B. 200, 201.
Co. Litt. 128. b.

Trevor chief justice. As to the demurrer, though (c) it does confess the matter of not specifying, yet that shall not hinder the plaintiff from having his judgment; for want of a specification, like all other matters, must be taken advantage of in a regular way, and by proper pleading.

Tracy justice. As to the third objection, the case of Sir *William Courtney vers. Grenville*, Cro. Car. 209. is in point, that it is well enough. Note, in that case, *per quoddam scriptum suum obligatorium* was left out; but yet there being a *proferet* of the bond in the end of the declaration, and upon *oyer* the condition of the bond being set forth, and by that it appearing to be a bond with a condition, and also it being found by the verdict upon issue upon *solvit*, that there is a debt due to the plaintiff, the court gave judgment for him.

And the like judgment was given in this case, the rule being made absolute.

(c) It seems that it is no confession, for a demurrer confesses nothing but what is well and sufficiently pleaded. *Rex v. the bishop of Chester*. Note to the first edition.

Fishop of Winchester vers. Wright.

Debt does not lie for rent reserved upon a freehold lease during the continuance of the lease. D. acc. Co. Litt. 47. a.

and see Co. Litt. 47. a. 13th. Ed. n. 4. and the books there cited. and 3 Ann. c. 14. s. 4.

IN debt for rent upon a demise of a fishery to the defendant for three lives, the plaintiff in his declaration set out the demise, *virtute cujus* the lessee entered, *et fuit et adhuc est inde possessionatus*. The defendant pleaded *nil debet*, and there was a verdict for the

plaintiff, In debt for rent under a lease for three lives, if the declaration, after stating the lease alleged that the lessee by virtue thereof entered and was and still is thereof possessed, it cannot be intended even after a verdict for the plaintiff on the issue of *nil debet*, that the estate was determined before the commencement of the action.

plaintiff. And serjeant *Pratt* moved in arrest of judgment, that it appeared upon the declaration, that the estate for three lives was continuing, and therefore debt did not lie, it being a rent issuing out of a freehold.

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Serjeant *Hooper* in answer said, that this was well enough after a verdict, for that *nil debet* put all the matter in issue, and if the estate had not been determined, the plaintiff could not have had a verdict; and that that matter indeed was the greatest matter litigated at the trial, and therefore the continuing not appearing directly, the court would take the estate to be determined.

Pratt said, that the averment in the declaration of the *suit et adhuc, &c.* was an express averment that the estate did continue; but if it were only indifferent, it would not be good, for the plaintiff ought to shew expressly in his declaration, that the estate for three lives was determined, or else he was not intituled to bring his action of debt within the statute of *Hen. 8.* Which was agreed by the court, and the judgment arrested.

Bucksome *vers.* Hoskin.

A Writ of error was brought of a judgment in ejectment in the common pleas, and the defendant in error sued out a *scire facias quare executionem non*, to compel the plaintiff to assign his errors, and there was a variance in the *scire facias* from the judgment; for the judgment was of two messuages, and the *scire facias* recited it to be but of one. And Mr. *Raymond* for the plaintiff in error, perceiving the variance, pleaded *nul tiel record* of the judgment. And now Mr. *Williams* moved, that the *scire facias* might be amended, because it was but *vitium clerici* in varying from the record, which was his instructions; and he cited 2 *Ventr.* 49. where an original in trespass, of trespasses done in two kings' reigns, *contra pacem nostram*, was amended and made *contra pacem nostram et contra pacem Jacobi nuper regis*, by the cursitors' instructions.

A variance in the statement of the judgment upon a *scire facias quare executionem non* cannot be amended after the defendant has pleaded to it *nul tiel record*. S. C. 6 Mod. 263. 310. Salk. 52. 3 Salk. 32. Holt 58. Vide post. 1309. 1472.

Holt chief justice. This is a good *scire facias*, but only it does not indeed come up to your case. In that case in *Ventris* the original was wrong, and therefore it was amended.

Nor can the writ be qualified.

Powell justice agreed, and that *non constat* to them, but there might be such a judgment as was recited in the *scire facias*.

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And for this reason they refused to amend it. Then Mr. Williams moved, that the writ may be quashed; but the court said, there was no fault in the writ to quash it for, and that he must discontinue.

Note, in that case in *Ventris* the writ was a good writ, if the trespass had been all done in one king's reign; and therefore all the fault was, that it did not fit the case, as it is here. And all the difference in the writs for several trespasses, where they are done in one king's reign, or in more, is in the conclusion, *contra pacem* of one only, or *contra pacem* of both; which was the reason why the court, in *Ventris*, held it a matter of fact, and not a matter of law, as was objected, and amendable. See 2 *Ventr.* 49.

Afterwards at another day Mr. Williams came and prayed, that the *scire facias* might be amended, and cited 1 *Roll.* 199, and 797. *Barnes vers. Worlich*, where the bail sued an *audita querela*, and a *scire facias* upon it, in the time of king James, which recited the *audita querela*, and the *capias* against the principal, and the return of it; which *capias* was awarded in the time of Elizabeth, and the *scire facias* recited it to be *per breve dominae reginae Angliae vicecomiti nostro de S. directum*, which is to the sheriff of the king that now is; that was amended.

Holt chief justice. That was a bad writ, and a fault in the body of the writ.

Williams. I will next cite your Lordship some cases of writs of *scire facias* amended, that were right writs considered in themselves. 22 *Edw.* 4. 6. b. a *scire facias* was brought to have execution of a judgment recovered by A. and B. Sulyarde for the defendant prayed, that the writ may abate, because the judgment was recovered by A. only; but the court amended the writ, because it was but *vitium clerici*. 11 *Hen.* 7. 25. a. a *scire facias* upon a judgment in assize, where one of the plaintiffs was knighted after the judgment, the writ was brought by A. B. mil. and B. C. mil, and the recovery was recited to be by A. B. mil. and B. C. modo mil. whereas the record of the judgment was by A. B. mil. and B. C. without naming him miles; and the court held, that the writ was ill, because it ought to have been, *cum A. B. miles, et B. C. modo miles per nomen A. B. militis et B. C. recuperaverunt*, &c. but that it was but the mistake of the clerk in mis-reciting of the record, and therefore it should be amended. 2 *Keb.* 175. *Williams v. Moore*, in a *scire fieri* inquiry, in the recital of the judgment, *curia domini regis* was mistaken for *nuper Oliveri*, and was amended, because it was a judicial writ, and the mis-

take in the recital of the record, which the clerk had before him. 2 Cro. 372. *Wheadon vers. Sugg*, in a writ of inquiry of damages the writ mentioned, that the plaintiff was nonsuited, *ideo ad inquirendum occasione permissa*, whereas the judgment was upon demurrer; and yet, because it was a judicial writ, it was amended in the king's bench after error brought there upon the judgment. So the case in *Keb.* was after error brought. 3 Cro. 760. *Whalley vers. Mosely*: the writ of inquiry of damages was awarded by the roll returnable *Martis post tres Trin.* but the writ was made returnable *Mercurii post tres Trin.* and executed *Martis post tres Trin.* and it was amended by the roll, because it was *vitium clerici* to make it returnable upon another day than was warranted by the roll; and it might be executed upon the day of the return. But otherwise it had been, if the writ had been executed upon the *Wednesday*, the day the writ was returnable, 2 Sid. 7, 12. there the court refused to amend the return of a *capias ad satisfaciendum*, but here they take the difference between that, and a *venire facias*, because (as it seems) that is to be made out by the award upon the roll, which reason rules this case.

The court refused to amend, because the plaintiff in error had taken advantage of this mistake in the writ, by pleading *nul tiel record*; and because this writ was a good writ upon the face of it, and all that was amiss in it was, that it did not fit the defendant's case. *Holt* chief justice said, that if the defendant had appeared, and taken no advantage of this variance, the court might have amended it. But here *nul tiel record* is pleaded, and can we amend when they have taken advantage of it? He said also, that this is not such a mistake as makes the writ erroneous, but is a mistake in a matter of fact. He said also, that the (a) plaintiff in error might plead to this writ of *scire facias*, the writ of error depending, but then he must shew in his plea, that he has assigned his errors, or else the plea is naught. *Powell* said, that at this rate you might amend all variances in writs. Now suppose a *formedon* were brought for ten acres, could it be mended and made twenty acres by the curfitor's instructions. *Powell* and *Holt* doubted of this.

To a *scire facias* quare executionem non if the defendant pleads that a writ of error is depending upon the judgment, he must shew that he has assigned errors. See vide Lill. Entr. 3.

At another day the case was stirred again, and the chief justice said, the cases were many of them obscure, and some of them for faults apparent in the writ itself, and that the case in 2 Cro. was the strongest case for the amendment. But he said Mr. *Williams* should have cited his cases at first. He said, that here a man was warned, to shew why execution should not be granted of one messuage, and

(a) Vide post 1295. Say 51.

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when he appears, you will make him answer for two mes-
suages. That it was hard to alter the writ in substance,
and make it quite another thing; that they might sue out
a new writ, because it was another record. *Powell* said,
that this plea of *nul tiel record* was a good plea when it was
pleaded, and that all variances were not amendable.

Mr. Williams did not move any more, but took out a
new *scire facias*, to which the plaintiff in error pleaded the
former *scire facias* depending, for delay, it being no plea by
reason of the variance.

Quere of this case? because the cases cited by *Mr. Wil-*
liams seem to be strong to the purpose, and the court (as I
thought) ruled the matter *basifiafter*.

Brewster v.
Wells, 6 Mod.
229.

The last day of the term upon a motion by *Mr. Salkeld*
in the case between *Mr. Brewster* and *Wells* for the curacy
of *Aldgate*, a *scire facias* out of the *Petty Bag* returned in the
queen's bench to repeal the queen's letters patent granted
to *Wells*, was amended, and *Spring* a man's name was amend-
ed and made *Spring*, by the instructions given to the clerk
of the *Petty Bag*; and the clerk of the *Petty Bag*, who made
out the writ, was sent for to amend it, because he who
made it ought to amend it; and the court examined him
touching the truth of the instructions.

The last day of *Hilary* term 3 Ann. (*absente Holt* chief
justice) upon the motion of *Mr. Pengelly* a *scire facias* was
amended; and where the judgment was recited as a judg-
ment of the third year of the queen, that was amended, and
made the first, agreeable to the record. But in both these
cases the amendments were made before plea pleaded, im-
mediately upon the return of the *scire facias*.

Anonymous.

CASE, wherein the plaintiff declared, that in confi-
deration the plaintiff had promised the defendant, to
buy up for him all the plums he could, and deliver them
to him; the defendant promised to pay the plaintiff so
much *per* hundred for the black and blue plums, and so
much for the white, and avers that he bought and tender-
ed the defendant so many black and blue plums, and he-
refused to accept them, to his damage. After verdict for
the plaintiff, *Mr. Page* moved in arrest of judgment. First,
that it did not appear how many blue plums, and how many
black plums there were, *id est*, how many of each sort. But
to that it was answered and resolved, that the black and
blue ones being to be both of the same price, it was not
mate-

material; otherwise, if the white and black had been put together without difference. Secondly, that the plaintiff did not aver, that the plums he tendered were all he had bought, or could buy; and unless he had done so, he had not performed his part, and was not intitled to his action. But to that it was answered and resolved, that that was now cured by the verdict; for unless the plaintiff had proved, that those were all he bought or could buy, it would have been against him, for want of proving the performance of the consideration.

ANONYMOUS.

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S. C. Salk. 51. Holt 424. with the arguments of counsel. 6 Mod. 263.

AN information was preferred by Mr. Attorney general against the defendant, for writing and publishing a libel called the *Observer*, and the *Observers* laid in the information were very scandalous. Issue was joined in the cause in *Trinity* term last, and the *venire facias* was returnable the 23d of *October*, which was the first day of the term; and the *distingas* was tested the 24th of *October*, and it was moved in arrest of judgment, the defendant being convicted upon the trial, that this was a discontinuance. This being a cause of great expectation, it being a prosecution directed by the queen, at the instance of the house of commons, it was very elaborately argued by Sir *Thomas Powys* the queen's premier serjeant, and Mr. Attorney general; that it was amendable by the award upon the roll, which is *instantur, ideo præceptum est, &c.* and which the clerk ought to have pursued. And after very solemn and long arguments on both sides, the court this day argued the case *seriatim*.

Vide 5 St. Tr. 544.

The *distingas* juratores must be tested on the very day on which the *venire facias* was returnable: if it be tested on the following or any subsequent day, the proceedings will be discontinued;

and the teste cannot be amended at common law.

Nor in criminal cases at least under any statute.

The 14th Ed. 3. c. 6. does not extend to any 8th H. 6. c. 13.

criminal case. Nor does the

Could justice held first, that it was amendable at common law, upon the authorities following. 2 *Bull.* 35. a case cited by *Yelverton*, in the case of *Odington vers. Darby*, where two men were indicted at the assizes for felony, and found guilty, and the indictment was in the singular number. And *Yelverton* doubting whether it were good or no, reprieved the men, and put the case to nine of the judges at the table, who all agreed, that the indictment was amendable, and accordingly it was amended, and the men were hanged. *Raymond* 440. *Englefield* and *Smith's* case. There 445. the book says, the second exception was, that the indictment sets forth a certificate from the commissioners under their hands, but not under their seals as the statute requires; but the court resolved, that in regard the certificate found in *hanc verba* in the verdict appears to be under their seals, it shall be amended, and it was amended. 1 *Sid.* 243. *Rex v. Percivall et alios*: an indictment for a riot

Whatever amendment might have been made at common law in a civil case may be made in a criminal one.

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riot in the city of *Canterbury*, and the *venire facias* and other process were directed *vicecomitibus de Canterbury*, where there was but one sheriff, and the return of the process was by one only; and the court upon examination of the sheriff of *Canterbury* upon oath, that there was but one sheriff, amended the process; and that at common law, and not upon the statutes of *jeofailes*. He said, that there was but one case against this, and that was the case of *Thobalds v. Newton*, *Stiles* 307. where in an action upon the statute of inmates, the *distingas* bore *teste* on a Sunday, and out of term, and upon a question whether it were helped by the statute of *jeofailes*, it was resolved by *Rolle* chief justice to be excepted. [Note, *Holt* chief justice observed upon this case, that it was strange, when the bar was so learned as it was in those times, that no body thought of the statutes of amendments, which they must needs have done, if it had not been taken for granted by all men, that the statutes of amendments had not extended to criminal cases; but they went upon the statutes of *jeofailes*.] And in the case of *The King v. Sherington Talbot*, *Cro. Car.* 311. and in *Jones* 320. where in a *quo warranto* the *venire* was mis-awarded, and a verdict for the defendant; the verdict was set aside, and the court held, that the statutes of *jeofailes* did not extend to *quo warrantos* or informations of intrusion, because the king is not bound unless he is named.

Secondly, If it had not been for the authority of the case of *Bradley v. Baggs*, *Yelv.* 204. 2 *Cro.* 283. I should think it well enough, because it is a continuance from day to day, which no day intervening is a perfect continuance. [The case of *Yelv.* was thus: a writ of appeal was sued out returnable *a die sancti Michaelis in 15 dies*, which was the sixteenth of *October*, and the *capias* upon it bore *teste* the twenty-third of *October*, where it ought to have borne *teste* the sixteenth of *October*, and was returnable *octabis Hilarii*, which was the twenty-third of *January*, and the exigent upon this *capias* bore *teste* the twenty-fourth of *January*, where it ought to have borne *teste* the same day of the return of the *capias*, viz. the twenty-third, and the exigent was returnable *a die sanctæ Trinitatis in quindecim dies*, which is the twentieth of *June* following, and the *allocatis comitatibus*, that issued upon it, bore *teste* the twenty-first of *June*, where it ought to have borne *teste* the twentieth, and for all these gaps in the process the court held the appeal to be discontinued, because every process ought to issue instantly, and without any mean time the one before the other.] But however that may be, I hold it, if it be ill, to be amendable at common law.

Pouys justice. The words of the statute of 8 H. 6. c. 12. are very general, "That the king's judges of the courts and places,

" in

“ in which any record, process, plea, warrant of attorney, writ, panel, or return, which for the time being shall be, shall have power to examine such records, process, words, pleas, warrants of attorney, writs, panels or returns, by them and their clerks, and to reform and amend in affirmation of the judgments of such records and process) all that which to them in their discretion seemeth to be misprision of the clerks, in such records, processes, words, plea, warrant of attorney, writ, panel, and return (except appeals, indictments of treason, and of felonies, and the outlawries of the same, and the substance of the proper names, surnames, and additions left out in original writs, and writs of *exigent*, and other writs containing proclamation); so that by such misprision of the clerk no judgment shall be reversed, or annulled.” Now the words of the statute being general, and the exception restrained to appeals and indictments of treason and felonies and outlawries of the same, it is strange how this statute came ever to receive such a restrained construction, as that it should not extend to criminal cases, against such plain words. In my lord *Fitzwalter’s* case, 2 *Lev.* 139. 3 *Keb.* 465, 485, 519, which was an information in nature of a *quo warranto* for a fishery in the river of *Thames* in a place extending into seven parishes, the *venire facias* was out of one of the parishes only, where it ought to have been out of them all. And there my lord *Hale* was of opinion, that it was helped by the statute of *jeofailes* of 21 *Jac.* 1. c. 12. where after a verdict the *visne* coming out of more or fewer places than it ought to be, is helped. See 1 *Sid.* 66. 1 *Keb.* 191, 215. and that though it was in the case of the king, it being not included in the exception, which is only of any writ, declaration or suit of appeal of felony or murder, any indictment or presentment of felony, murder or treason, or any process upon any of them, or any writ, bill, action, or information upon any popular or penal statute. And *Hale* said, that the exception was an excellent key to explain the statute by, and a perfect argument that *in casibus non exceptis* the statute was to take place. The rest of the court were indeed of another opinion, upon the case of the King and *Sherrington Talbot*: *Cro. Car.* 311. But however, I am tender of giving my opinion upon the statute, but I take it to be well as it is, or if it be not, yet it is amendable by the common law. To prove it to be well as it is, he used the same argument as *Gould*. And as to the case of *Bradley v. Baggs*, he said, as it was reported in *Yelv.* there was a gap of seven days, which was a great one, and by *Croke’s* report of the case, the court went upon that gap. And in *Yelv.* there are other faults. As to making the amendment he said, that there had been much bolder amendments made; that this was only an error in process, and was a mere mistake of the clerk. That besides those cases of amendments at common law

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law in criminal cases cited by Mr. Justice Gould, there was Plummi's case, *Palm.* 480. the defendant was outlawed upon an indictment of murder, and the *exactus* was *ad comitatum* without saying *meum*, and the attorney general prayed a *certiorari* to the coroners, to certify where the defendant was *exactus*, to the end that upon the return thereof they might amend the return of the *exigent*, according to a precedent cited in the time of Edward IV. where one Stanley was indicted, and it was in some places *Sanley*, and a *certiorari* was awarded accordingly. 1 *Sid.* 66. 1 *Keb.* 191, 215. *Rex v. Reed.* Upon issue joined in an information of perjury, one of the jurors returned upon the *venire facias* was named J. S. and upon the *distingas* he was named J. S. jun. but he was not one of the twelve that tried the cause, and all the judges agreed it to be well as it was, and some of them held it was aided by the statutes of *jeoffailes*, informations at common law not being within the exception. And *Twissden* denied that, but held it to be amendable upon 8 *Hen.* 6. the exception being only as before. He cited also 1 *Roll.* 201. n. 36. *Thorp v. Fanshaw*: if the award of the *venire facias* upon the roll be well, and this writ of *venire facias* ill, yet it shall be amended by the roll; the roll being the act of the court, and the warrant of the writ, and the fault is only the misprision of the clerk: this case is there said to be cited *Trin.* 39 *Eliz.* which case is reported in *Cro. Eliz.* 572. *Rogers v. Bird*, and was also cited by him. Where upon issue joined in debt upon a bond, the *venire facias* was returnable *sabbati post octabas Trinitatis*, and the *distingas* was tested the day after *crastinum Trinitatis*, and because by the award upon the roll the *venire facias* was returnable *crastino Trinitatis*, which was well, and was the warrant to make the *venire facias*, it was the default of the clerk to make it contrary to the roll, and it was therefore ordered to be amended according to the roll. He said that he admitted that these cases were only civil cases, but that the use he made of them was to shew, that these variances were only misprisions of the clerk, and were therefore amendable in this case, for the same reason that they were amendable in those.

But note, that
this was a day
before the day
of *sesta* of the
distingas.

Gould justice in his argument cited the case of Sir John Curson *et ux.* 2 *Cr.* 529. an information upon the statute of recusancy for the recusancy of the wife, the defendants appeared, and the record was, *et prædictus Johannes Curson et Magdalena veniunt, et prædicta Magdalena dicit, quod ipsa non est inde culpabilis, et de hoc ponit se super patriam, et attorney domini regis similiter*; and it was moved in arrest of judgment for the defendant, that this plea was only the plea of a *feme covert*, which was void without her husband joining with her, and consequently no issue was joined; but it appearing to the court, that the docket was *quod Johannis Curson*

Curson miles et Magdalena uxor ejus, placitant non cul. they held, that was the warrant to the clerk, who ought upon that to have drawn the plea in both their names, and when he omits the husband's, it is but the misprision of the clerk, which shall be amended, and it was amended accordingly. But otherwise, if the entry had been, that the *baron* and *feme* had pleaded, *quod ipsi non sunt inde culpabiles*, because that would have altered the issue.

Powell justice made three questions. First, whether this *teste* of the writ the next day were a discontinuance, Secondly, if it were, whether it was amendable by the statute of 14 *Edw.* 3. c. 6. or 8 *Hen.* 6. c. 12. And, Thirdly, if it be not amendable by these statutes, if it be amendable at common law. As to the first he said, it was a discontinuance. All process must be tested the same time that it is awarded. So is the case of *Bradley v. Baggs*, and the reason of it is, that the award of the court only warrants taking out of the process at that time, that it is awarded. And if any time intervene, it is a discontinuance in all cases at common law, and consequently the process to the jury here is discontinued, and the *distringas* is without warrant. 21 *Edw.* 4. 20. *Br. Contin.* 82. at the return of the *venire facias* the defendant was effoined, and had day by his effoin to *Pasch.* and it was held, that the jury could not have an *idem dies*, as you do in case, where there are two defendants, and one of them is effoined; but that there must be a *habeas corpora* to the jury returnable at the same day. There must be a chain of process. The *distringas* might as well be tested the 25, as the 24, for they are both equally unwarranted by the award of the court, which is the reason why the *teste* in the present case is wrong.

As to the second, he said, the words of the statute were very general, and might take in criminal cases, and cases where the queen was a party; but he could not think, that the judges in all times could have been so mistaken, as to take such cases to have been out of the statutes, if the statutes had extended to them; as it appeared plainly they had done, by resorting always to the common law for amendments in these cases, and not amending them upon the statutes. [The words of the 14 *Edw.* 3. are: "it is assented, that by the misprision of a clerk in any place, wheresoever it be, no process shall be annulled, or discontinued, by mistaking in writing one syllable or one letter too much or too little; but as soon as the thing is perceived by the challenge of the party, or in other manner, it shall be hastily amended in due form, without giving advantage to the party that challengeth the same, because of such misprision."] That which he took to be the reason, why the statute of *Edw.* 3. did not extend to these cases

was,

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The queen is never comprehended in a statute by the word party.

was, because the amendment is to be made upon the challenge of the party, that there it is a mistake, and without giving advantage to the party that challenges the mistake. And the queen is never named in an act of parliament by the name of party. Now this act extends only to process out of court, but the court by this statute had no power to amend any mistakes in entries upon the roll; and therefore the 8 H. 6. c. 12. was made to enlarge the judges power of amendments that it should extend to other things besides process, but it was not intended to be extended to other sorts of cases. And the 8 Hen. 6. shall be expounded by the words, challenge of the party, in the 14 Edw. 3. and the exception was only put in *in majorem cautelam*. As for the statutes of *jeofailes*, the first, which is 32 Hen. 8. c. 30. is tied up by the recital all through, and the body of the act, to the party demandant and plaintiff, and the party tenant and defendant; and though there is no exception in this act, yet it was made a great question, if this act extended to the vouchee, where he entered into the warranty, and became tenant, and a verdict passed for him, the judges adhered so nicely to the very words of the statute. In all the subsequent statutes of *jeofailes* there are exceptions, which extend to except these cases, though, if there were none, they ought all to be expounded upon the foot of this first statute. *Hale* chief justice seemed indeed in my lord *Fitzwalter's* case to think, that it was within the statutes of *jeofailes*, but there was never any judgment given upon the foot of those statutes. But supposing it were a civil case, it may be a question, whether this fault in the *teste* of the writ would be amendable or no. Now the *teste* of an original writ is not amendable. And so it was resolved by the house of lords, with the concurrent opinion of all the judges, upon consideration of *Gage's* case, 5 Co. 45. b. in the case of my lord *Jeffreys*, [and a judgment given in *Wales* upon the authority of that case was reversed. And upon that occasion the record of that case was searched for, and found not to warrant the report. And *Holt* chief justice said, that the record of the case is in *Co. Intr. tit. Err. p. 9, 250.* and the judgment of the court is contrary to the report, for the writ was not amended, but the fine was reversed. And as I have heard *Twissden* justice say, the estate is enjoyed under that judgment ever since.] But some think that a judicial writ differs, and that the *teste* of that is amendable by the roll. This matter was made a question in the case of *Carew v. Merler, Cro. Eliz. 820.* where in error of a judgment in debt, the *venire facias* appeared to be tested after the judgment, and the court held, that this, though certified to be so, could not be taken to be the *venire facias* in this action, and that they would intend the cause was tried without any, which was helped by the statutes of *jeofailes*. But as to amending it, they took this difference, that the return of a writ

Teste of an original not amendable. 1 Lev. 2.

The teste of a writ of assise was duodecimo for duodecimo, and not amendable, but the writ abated.

Note, This was said by the said judges in the case of *Harvey v. Broad* this term, upon mention made of *Gage's* case, Salk. 626.

The teste of a writ of entry was after the return and out of term, and the judgment was reversed. Dier 329. n. 62.

A scire facias in C. B. was tested on a Sunday, and the judgment was reversed. Dier 163. n. 17.

writ might be amended, because that is warranted by the award upon the roll, and therefore being made different from that, might be amended. But the *teste* of a writ can never be amended, because the roll makes no mention of that. But he said, it was the nescience of the clerk to make the *teste* of another day than the award of the court was, for he ought to know, that the writ should be tested, when the court awards it. The latter books have gone contrary to this case in *Croke*, where the writ has been an ill writ, as if it were tested out of term; but this was a good writ, and therefore it should seem, that it were not amendable. But in *Yelv. 64. Nevill v. Bates*, the *venire facias* was returnable 15 *Hil.* and was tested the 12th of *February*, which was after the return, and it was amended and made to issue before the return, because it was but the default of the clerk. And a precedent was shewn, where a *venire facias* tested out of term was amended and made to bear *teste* in term; and in the principal case, the *disfringas* was tested the 12th of *February*, and amended, and made to agree with a return of the *venire facias*, because but the misprision of the clerk. And the case of *Lee v. Bacon Yelv. 64, 69.* in trespass in the county of *Salop*, and not guilty pleaded; the *venire facias* was *vice-comiti*, omitting *Salop*, and yet the sheriff of *Salop* returned the jury; and it was amended, because it was the fault of the clerk. He concluded, that if it had been a civil case, he should have thought it amendable upon upon the statute of *Hen. 6.* because it was but the mistake of the clerk, and appeared to them to be so upon the examination they had taken of the matter.

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Teste of a judicial writ amendable.

As to the third point he said, that he admitted that there were amendments at common law. But the instances of what was done with relation to records in the same term, would conclude nothing, because it is not a record, though the entry be made, till after the term, but is during all the term in the breasts of the judges. And that saying of my lord *Coke, 8 Co. 157. a.* that at common law misprision of the clerks in another term in process was not amendable by the court, for in another term the roll is the record; must be understood of the award of the process by the court upon the roll. For the misprision of the clerk in making out a writ with a wrong *teste* is not in the breast of the court, and therefore that saying must be restrained to the award of the process upon the roll. For process is never any otherwise in the breast of the court, than as they award it; and therefore there will be no difference as to this amendment, whether it be done in the same term, or in another. There is no case of amendments at common law, where it has been extended so far as to amend process, but only the acts of the court in entering continuances. There have been amendments made in criminal cases as at common law, but never any that were founded upon the statute of *Hen. 6.* But

7 Hen. 6. 30.

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I cannot come up to these cases: as *Harris's case*, 2 Cro. 502. [The case there was, a record of an indictment of nuisance was removed into the king's bench by *certiorari*, and in the joining the issue these words, *et Ricardus Warer qui pro domino rege sequitur similiter, &c.* were left out; and it being moved in court that there was no issue joined; the court, in regard it was but a matter of course, and the omission of it was but the default of the clerk, ordered it to be amended, and it was so done, and those words inserted, though it was divers years before, and in the time of another clerk of the peace, yet the present clerk of the peace was ordered to amend it.] The reason of that was, because it was looked upon to be a thing of course. But I cannot come up to it. That is not this case. I cannot come up to that case in *Palmer* neither, and there are multitudes of cases contrary to it, where outlawries have been reversed for that exception. That case cited by *Yelverton* does not appear certainly, what the mistake was, and the singular number for the plural might be very material. As to the amendment in *Sir John Curson's case*, that might be, because it was but a mere mistake in the entry, and there was a docket to warrant the amendment. As to the case in *Kelle*, there they thought it was well, because that jurymen was not one of them that tried the cause; and they thought it was the same man, and that *junior* was only a farther ascertaining of him; and I do not find that it was amended. I think criminal cases may be amended as far as civil cases might by the common law. But then in order to know how far that is, you must look into the old books, and see what was done before the 14 *Edw. 3.* and where we cannot find any precedent of an amendment to warrant it, we must not extend our power of amending at common law indefinitely. And this being an error in process, I think it is not amendable at common law.

Holt chief justice. This is an omission in a point material. The *return* of the *distringas* should have been the 23, and it is the 24; the *distringas* should have issued the same day the *venire facias* was returnable. Suppose a man has day in court the 23, and no new day is given him till the 24, this will be a discontinuance, because he, having no day given him on the 23, is at the expiration of the 23 out of court, and when you give him a day upon the 24, you give it him behind his back. The defendant indeed in this case had a day upon the roll, but then the writ of *distringas* is without any warrant by the roll, being different from that which was awarded by the court, and so the *distringas* issued without any authority. So there is a material variance between the writ issued, and the award of the court, and that will make it a different writ from that which was awarded. This is a good writ, and the statute intended only to amend writs that were vicious by the mistake of the clerk, in writing a let-

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a letter or syllable wrong. But if you will amend this *distingas*, you must make it, as if it issued the 23d of October, when indeed it is a vicious writ, and issued ill. If this mistake had been in process in a civil case, it had been aided after verdict, and so in those cases such mistakes may be amended or not at pleasure, which will answer all cases of such amendments in actions between party and party. But I would be glad to see such an amendment between the statute of Hen. 6. and 32 Hen. 8. Indeed a *teste*, that is impossible, or upon a Sunday, or out of term, is amendable, because it is a plain mistake of the clerk. And that was the reason of the case of *Nevill v. Bates*; there the *teste* of the *venire facias* was after the return and ill, being to distrain jurors not summoned. The case of *Bradley v. Baggs* proves that this is a discontinuance: and it is the constant course to *teste* the succeeding writ the same day the former writ was returnable, and it is always so done in the common pleas, however it may be used here. But the clerks are not agreed it seems about this matter, and so it seems to be a matter of skill. I should have thought this mistake not amendable, if it had been in a civil action, and therefore *a fortiori* I think it not amendable in a criminal proceeding.

After the chief justice and *Powell* had delivered their opinions, that this mistake was not amendable, *Powys* who had delivered his opinion with great dubiousness, and concluded it only, that he rather thought it amendable than not; because as he said, it should not go upon a court divided, came over to them, and held it not to be amendable.

Note, I was not present at the arguments, expecting it would have been printed, all the proceedings having been taken for the purpose in short-hand, and was not for the same reason so exact in the taking the arguments of the judges; which therefore may not improbably have been mistaken; and therefore I shall add some few cases that were cited in this case, that are not cited before, but without any inference or application.

For the amendment *Cro. Car.* 144. *Sir Humphry Tustan* and *Sir John Ashley's* case; In a *quo warranto* against the corporation of *Maidstone*, a judgment was entered by disclaimer by consent, of all liberties *virtute vel prætextu literarum patentium gerentium datum* 17 Jac. Reg. but the words *gerentium datum* 17 Jac. Reg. being in the margin of the paper book, and a stroke made cross them, the clerk in ingrossing the judgment had omitted them. And now it was moved, that they might be inserted, having been omitted by the mere negligence of the clerk. And though it was opposed, because none of the statutes of amendments extend to

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cases where the king is party, and the amendment will alter the record in substance, and such an amendment cannot be made in another term, much less in another year; yet it appearing to the court to have been the intent of the parties, to have those words in, and Mr. Attorney certifying, that they were inserted in the paper book by his own hand, according to their intent, and it not appearing, when or to what intent that stroke was made cross them; it was held by all the judges to be amendable by the course of the common law, and as well in another term, as in the same term, and as well in the case of the king as of a common person; it being a mere misprision of the clerk.

1 Roll 196.
A. 1.

Against the amendment 34 Hen. 6. 20. upon an issue joined in an action of debt, upon the *venire facias* 24 jurors were returned, and upon the *habeas corpora*, and all the process after, only 23. And for this all the process after the *habeas corpora* was held void, and that it could not be amended, and a new *habeas corpora* was granted. 2 Roll. 3. 11. Upon an issue joined in an action of debt, the *distingas* was awarded upon the roll returnable *in tres Pasch.* but the writ was made out returnable *quindena Pasch.* and a trial was had on that day, and judgment for the plaintiff; and reversed, because the writ was not warranted by the award upon the roll; and though the docket was, that the *distingas* should be returnable *quindena Pasch.* and that the parties should have that day, yet they would not amend the award, the roll being the act of the court in another term. Dier 211, in error to reverse an outlawry, the writ of *exigent* was awarded upon the roll returnable *octab. Mich.* and the writ of *exigent* was made returnable *mensē Mich.* and *ad quintum comitatum tentum inter octabas et mensem* the party was outlawed; and erroneous, because the writ ought to be warranted by the roll. Yelv. 60. *Briggs v. Thompson*: an information upon the statute of 21 Hen. 8. against a spiritual man for taking land to farm, upon issue joined the *venire facias* was awarded upon the roll returnable *coram nobis ubicunque, &c.* but the writ of *venire facias* was made returnable *coram nobis*, leaving out the words *ubicunque, &c.* not answering to the roll, and utterly uncertain, the king's bench being removable; and for this the judgment was arrested. 8 Co. 162. b. *Blackmore's case*. The statute of Henry VI. does not extend to appeals, nor to pleas of the crown, or to any proceedings upon them, for they are excepted, nor to the amendment of any *exigent*, to cause any one to be outlawed, &c. 2 Sid. 7, 12. An attorney gave instructions to his clerk, to make a *capias ad satisfaciendum* returnable in Trinity term; and he seeing that the last day of that term was the twenty-fifth of June, by mistake in writing July for June, made it returnable the twenty-fifth of July: and upon motion refused to be amended. That the statutes of *jeofailes* do

do not extend to this case, 8 Co. 163. a. *Blackmore's case*, when a verdict upon an issue tried is given. So misprisions are not remedied by 32 Hen. 8. 18 Eliz. or any other statute, but remain yet not amendable, in appeals or pleas of the crown, as indictments, &c. or any proceeding upon them; for they are excepted in the act 8 Hen. 6. and the statute 32 Hen. 8. and 18 Eliz. does not extend to them. 1 Ventr. 17, 35. *Perry's case*: In an information of forgery, the forging was laid at S. and the publication at D. and upon issue joined the *venue* was from D. only, and it was held to be a mis-trial, and not aided by the statutes of *jeofailes*, neither within the words, nor intention of them; though it was urged for the king, that it was an information at common law, and so not within the exception.

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S. C. burnot so full, Salk. 42. 3 Salk. 23. 6 Mod. 304. 3 Danv. Abr. 351. pl. 4.

AN administrator *cum testamento annexo, durante absentia* of an executor, brought an action: and upon demurrer to the declaration Mr. *Broderick* took exception, that it was said in the declaration only that the executor was absent, and not said where, for it might be only from this court, and it ought to have been averred, that the executor was absent *in partibus transmarinis*. That in all cases of a temporary administrator, if he will bring an action, he must aver that the administration has continuance. So it is of administrator *durante minori ætate*, he must aver, that the person during whose minority, &c. is under the age of seventeen. So 3 Keb. 212. *Buckley v. Welch*; if an administrator *pendente lite* brings an action, it was agreed by the court, that he must aver, that the contest continues. And there is no authority in the law against it. As to the case in 4 Mod. 14. *Hodge v. Clare*, where in a *scire facias* brought by an administrator *durante absentia*, upon a judgment, and upon demurrer to the *scire facias* this exception is said to have been taken, and that the court resolved, that the defendant ought to plead it; upon search of the roll in that case, there is a full averment, that the person, during whose absence, was *in partibus transmarinis*, and no ground for the objection.

If an administrator *durante absentia* of an executor brings an action, he must shew in his declaration that the executor is *in partibus transmarinis*. Vide ante 408 and the books there cited.

The chief justice and *Powell* said, that the administration *durante absentia* must be intended of an absence out of the realm, and therefore the administrator plaintiff in his declaration ought to aver, that the executor is out of the realm. And the chief justice said that it (a) was reasonable there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minori*

(a) Acc. Lutw. 342.

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minori ætate of an executor, viz. that there should be a person to manage the estate of the testator, till the person appointed by him is able. And he said, upon the observation upon 4 *Mod.* see the inconveniencies of these scrambling reports, they will make us appear to posterity for a parcel of blockheads.

Judgment was given for the defendant.

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S. C. but with some little difference Salk. 322. 11 *Mod.* 34. Holt. 303. 646. more at large, and with the arguments of counsel. 6 *Mod.* 290.

The death of a party who has sued out, a *fiere facias* after the seizure of goods but before the sale of them will not abate the execution, or in title the party against whom the execution was sued out to a restitution. Vide ante 244.

A Writ of error of a judgment in the common pleas upon a *fiere facias* by Clerk against the defendant, sheriff of *Middlesex*. The case appeared to be, that one *Dives* as administratrix of *J. S.* had recovered a judgment for 304*l.* against Clerk, and sued out a *fiere facias* upon that judgment, directed to the defendant, sheriff of *Middlesex*. And upon that writ the defendant returned, that he had seized goods to the value of the debt, and that they remain in his hands *pro defectu emptorum*. Afterwards and before the goods were sold, *Dives* died, and Clerk sued out this *fiere facias* to the defendant, to shew cause why the goods should not be restored to him; as supposing that now *Dives* is dead, there is no body can have the fruits of the execution. And upon demurrer to the writ, judgment was given for the defendant in the common pleas.

This case was argued *seriatim* by all the judges; and by their unanimous opinion judgment was affirmed. Note, the matter was not debated in the common pleas.

When the defendant's goods are seized on a *fiere facias*, the debt is discharged.

Gould justice. I am of opinion, that judgment ought to be affirmed, for these reasons: first, because Clerk is by this seizing of his goods in execution discharged of the judgment; and therefore where upon a *fiere facias* the defendant paid the debt to the sheriff, this was held to be a good plea to an action of debt upon the judgment, *Cro. Eliz.* 208, 390. 1 *Lut.* 588. So in a *fiere facias* upon a judgment the defendant pleaded, that his goods were taken in execution by the sheriff upon a *fiere facias* upon that judgment, and well, *Cro. Eliz.* 237. So in *Dike's* case, *Trin.* 36 *Car.* 2. *B. R.* rot. 504. (see the case by the name of *Dike v. Mercer*, 2 *Show.* 394.) where two men were bound jointly and severally, and judgment and execution had against one of them, and his goods seized, but the sheriff had not satisfied the plaintiff, nor sold the goods: and in an action of debt against the other obligee, he pleaded this matter; and it was held, it was no plea for him, because it was not satisfaction; but it was held, that it would have been a good plea

plea for that defendant, against whom the judgment and execution was obtained, if he had been sued again. Secondly, the sheriff may sell the goods by authority of law, without a writ of *venditioni exponas*, and after his year is expired, and he is out of his office. And so is 2 Cro. 73. The case of *Thoroughgood* in Noy 73. is, that if the plaintiff dies after a *fiery facias* awarded, yet the sheriff may levy the money. And if the plaintiff makes no executors, nor administration is as yet committed, the money shall be brought into court, and there deposited, until, &c. And where a *fiery facias* goes to the sheriff, he cannot return, that the plaintiff is dead, and therefore he did not execute it, Cro. Car. 459. or if he execute it, and levy the money, and the plaintiff dies after that, and before the return of the writ, the executor or administrator shall have the benefit, and shall have the money, Cro. Car. 459. 1 Sid. 29. Where the executor sues an *elegit* upon a judgment recovered by himself, and before the debt is levied dies intestate, the administrator *de bonis non* shall take advantage of this execution: otherwise, if he had died before execution sued out. The substantial part of the execution in this case is executed in the life-time of the executor, and there is nothing wanting to compleat it, but the formal part. For as soon as the sheriff seizes the goods by virtue of the writ of *fiery facias*, he gains a special property in them, and may maintain trespass against the defendant, if he takes them away. So is Cro. Eliz. 635. So he may maintain *trover* against a stranger, that takes them away. *Wilbrabam v. Snowe*, 2 Saund. 47. 1 Lev. 282. And in that book *Kelynge* holds, that the property is divested out of the owner, and vested in the party at whose suit the writ issued. When the sheriff has returned, that he has levied 100*l.* an action of debt lies for the administrator *de bonis non* against the sheriff. This is not like the case of *Cleeve and Veer*, Cro. Eliz. 450, 457. *W. Jones* 385. where an executor sued out an *extendi facias* upon a statute, and before the inquisition taken died, and the administrator *de bonis non* sued out a *liberate*, and the execution was held to be void, because by the death of the executor the writ of *extendi facias* abated; for there was a farther act to be done, which is not in this case, viz. the awarding a *liberate*, which is an act of the court; and till that is awarded, the execution is not compleat.

Powys justice said nothing new, as I observed, but only that the case in Sid. 29. was a stronger case than this.

Powell justice. I am of opinion, that this *scire facias* does not lie. The question is, what shall become of the goods, whether Clerk shall have them again? He supposes that no body has a title to them but him, because he has the general property. I shall not determine how it would

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A man who has been sheriff may after he is out of office sell goods he seized under a *fiery facias* while he was in, R. acc. 1 Barn. 81. Acc. 1 Roll. Abr. 893. l. 45. 10 Vin. 569. pl. 2.

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have been, if execution had not been in part executed. As my brother Gould observes, it is a good plea by the defendant, that the sheriff has taken his goods in execution, and still detains them. An execution is an intire thing, and that sheriff that takes the goods in execution, shall go on, and sell, though he is out of his office, and not the new sheriff. And so is 34 Hen. 6. 36. n. 5. the reason of which case is, because if an execution is once begun before a writ of error allowed, a writ of error that comes after is no *superfideas* to the execution. For the officer in that case is only to go on to compleat it. This case differs from the case of *Cleave and Veer*, because in that case there must be a *liberate*, which must be awarded in the court; and that is the reason of that case; because there is something farther to be done, and therefore the death of the executor plaintiff abates the writ. But in this case a *venditioni exponas* is not awarded by the court. But then it is objected, what shall become of the money, when here is no plaintiff in court to receive it? As to that, the money must be brought here and shall be kept in court, as money recovered in the executor's life time, till the person that has title applies to the court for it, and upon producing to the court his title, viz. his letters of administration *de bonis non*, the court will deliver him the money.

Holt chief justice. The question is, whether the defendant in the action shall have a *fiere facias* against the sheriff, or no? And I am of opinion, that the judgment ought to be affirmed.

Upon a fieri
facias the sheriff
may pay the
money to the
plaintiff.

1. Because, after seizure of the goods, there is nothing to be done by the sheriff, but to bring the money into court, though indeed if the sheriff pay the money to the plaintiff, that is well. For the writ is, *quod fieri facias de bonis, &c. et denarios illos habeas coram nobis, &c.* so that when he had seized the goods, he has nothing to do but to bring the money into court. And the death of the plaintiff after the seizing of the goods, does not hinder the sheriff from executing the residue of the writ, which is to bring the money into court.

Distingas nuper
vic. two sorts.

2. Though the sheriff is out of his office, yet he is bound to sell the goods. For when he has returned, that he has seized the goods, and that they remain in his hands *pro defectu emptorum*, that is no discharge to the sheriff, but only an excuse to the court. But he must still sell the goods even without a *venditioni exponas*, and he is compellable to do it, though he is out of his office. And for that purpose a *distingas nuper vicecomitem* lies against him, of which writ there are two sorts. The first the old sort, which is mentioned in the book of 34 Hen. 6. 36. n. 5. to

distrain

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distrain nuper vicecomitem, ita quod bona illa venditioni exponat, et denarios provenientes liberari faciat præfato nunc vicecomiti, ut ipse vicecomes denarios illos coram iusticiariis hic habere possit tiel jour, ad reddendum præfato querenti. And if this writ lies, it proves that he has an authority to sell the goods; or else it would be unreasonable, that the party should have such a writ. For consider what is to be done on this writ, for the sheriff must return issues against the old sheriff upon it, and so in infinitum; which would be strange, to compel a man to sell goods, that has no authority. The other sort is indeed new. You have it in *Raft. Intr.* 164. *Thes. Brev.* 90. and is to distrain the old sheriff, to sell the goods, and have the money himself in court at the return of the writ. Then since the sheriff is compellable to sell the goods, what hinders him from doing it, though the plaintiff is dead. The sheriff is answerable for the value of the goods after he has seized them, and he is bound to sell them at all events, and he is bound to the value he has returned them to be of. And though the goods are lost or rescued from him, he is bound, not to that value they may after appear, or be found to be of, but to the value he returned them to be of; that is the value he is bound to, and an action of debt lies against him for that value. And that is the case in *Saunders's Reports* (2d part 343. *Mildmay v. Smith*) and by the same reason he is compellable to sell them according to that value.

3. The plaintiff has no farther remedy against the defendant, against whom he recovered his judgment, but must go on against the sheriff. For the defendant having lost his goods, may plead, levied by *feri facias*, in bar to an action of debt or *scire facias* upon the judgment. And to this purpose is the case of *Atkinson and Atkinson, Cro. Eliz.* 390. where in a *scire facias* on a judgment in detinue, the defendant pleaded, that upon a *distringas* upon that judgment to the sheriff, he delivered the goods to the sheriff; and that was held to be a good plea. And the seizing the goods upon the *distringas* is the same thing in that action, as levying the money upon a *feri facias* in other cases. And as my brothers say, it has been held to be a good plea, that the defendant's goods were seized upon a *feri facias*.

4. This case differs from the case of *Clerue v. Veer*. The judges held there, that the extent was void, because the writ was abated. But why? Because no right was vested by the extent. For the purport of that writ is to extend and seize into the king's hands, that he may deliver to the plaintiff; which is to be done upon the award of the *liberate*, which could not be awarded in that case, because the executor, who was plaintiff, was dead; any more than where an executor sues a *scire facias* upon a judgment, and has a judgment, *quod habeat executionem*, and then dies, the (a) administrator

(a) Acc. ante
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de bonis non cannot sue execution. But here is no necessity to have any thing more done, or any act of the court, to enable the sheriff to sell the goods; but in that case the plaintiff could not enter without a *liberate*. And this difference seems to be intimated, though not so clearly, in the case cited out of 1 *Sid.* 29. Here the sheriff is become responsible to the executor for the value he has returned the goods at, and he is chargeable to the executor in the right of the testator. And when that right is come to the administrator *de bonis non*, the sheriff shall bring the money into court, and upon the administrator *de bonis non* coming in and shewing his letters of administration, he shall take it out. Here is no further act to be done to empower the sheriff; for though the return of the residue *in custodia pro defectu emptorum* is a good excuse, so as the sheriff shall not be amerced, though he has not brought the money into court; yet he must sell the goods in convenient time: for if a *distingas* is taken out, he must sell the goods before the return of the writ, or else he forfeits issues.

Intr. Hil. 2
Ann. Rot. 243.

An award which directs the performance of an act within a limited time a *datu arbitrii*, is good, tho' it is not dated. S. C. 6 Mod. 244. Salk. 76. Holt 212. Semb. acc. 5 Co. 1. b. ante 335. D. acc. 3 Bulstr. 12.

An award which directs the removal of a nuisance is good, tho' it does not determine who shall remove it, if it appears that the land on which it is erected belongs to either of the parties. S. C. 6 Mod. 244. Salk. 76.

Under a submission of disputes on account of certain nuisance to a particular house, tho' the award mentions the house without particularizing it, yet if it imports to be made upon the premises submitted, the house mentioned in the award shall be taken to be the house mentioned in the submission. S. C. 6 Mod. 244. An award which directs that one party shall pull down his balcony, if the other desires it, is sufficiently beneficial to him who has the election to prevent him from objecting that it wants mutuality. Under a submission of past differences arbitrators cannot prescribe rules for the future conduct of the parties. Under a condition to produce a lease whereby the party holds an estate, he need not in averring performance set out the lease. S. C. Salk. 498. Holt 212.

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DE B T upon a bond conditioned to perform the award of *John Olley, &c.* of and concerning all suits, &c. now depending between the said *Charles Breame* and *Theophilus Armitt*, for or by reason or means or on the account of any erection, edifices, piles of wood, pipes, water-courses, balconies, back-doors, ways and passages, or other act, matter, cause or thing whatsoever, by the said parties, or either of them, in or to the detriment, damage, annoyance and impediment, or by infringing on the right of the one or the other of them respectively, erected, placed, built, committed, done or suffered in, upon or about all and every or any the messuages or tenements and wharfs, with their appurtenances, situate and being within the precinct of the hospital of *Bridewell, London*, which they and each of them respectively claim, hold and enjoy by, from and under the mayor, commonalty and citizens of the city of *London*, governors of the said hospital, or any of them, by virtue of any lease or assignment of lease, or other power whatsoever: and do and shall produce and shew to the said arbitrators, or such of them as shall require the same, the lease, assignment of lease, or other power, whereby the said defendant holds his part of the premises, or a true copy thereof, to be perused

by

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by the said arbitrators, as they shall think fit, &c. The defendant pleads, that before the time limited by the arbitrators to make their award in, *scilicet, tiel jour, ipse produxit et ostendebat* to the arbitrators at their request *dimissionem et potestatem, per quam idem* the defendant *tenuit ejus partem præmissorum, scilicet, omnes evidencias suas, et totum titulum suum adinde per eos perutend.* prout optum putabant; and the arbitrators made no award. The plaintiff replies and sets out an award, which replication, as far as concerns the objections taken and debated, was this: That the arbitrators the 9th of October 1702, did make their award in writing *de et super præmissis in conditione prædicta superius specificatis*, and thereby did award, that the scaffolds and deals of the South part of the house of the plaintiff should be taken down within 58 days, *a datu scripti arbitrii, &c.* and no more scaffolds should be erected, or built, nor deals piled, between the river *Thames*, and the aforesaid house of the plaintiff, within the breadth of the then lights of the said house, yet the ground to be used for any goods as a wharf by the defendants, so that the windows of the South part of the said house of the plaintiff should not be darkened or obstructed: and the arbitrators did further award, that the balcony of the South part of the house of the plaintiff should be taken down, if the defendant should desire it, within three months next after the execution of the aforesaid award: and the arbitrators did further award, that the drain and water-pipe which *tunc venerunt subter wharfam prædictam* of the defendant *ad Australem partem prædictæ domus prædicti* the plaintiff, should remain as the same then were, and that the defendant *licentiam daret ad tempus conveniens pro emendatione et reparatione inde si occasio foret*: and farther, that the wall of the West side of the plaintiff's house is a party-wall, and that if the defendant should at any time hereafter build against it, he should pay so much of the charges, and half the charges of a party-gutter; and that the water should be brought down from thence *super dictam wharfam prædicti* the defendant, &c. And although the plaintiff has always kept and performed all things in the said award, which were of his part, to be kept and performed, and *protestando* that the defendant has not done so on his part: the plaintiff *in facto dicit*, that the scaffolds on the South part of the house of the plaintiff in the writing of award aforesaid mentioned at any time within 58 days *a datu scripti arbitrii prædicti* were not taken down *secundum formam et effectum arbitrii prædicti*, but the defendant the same scaffolds on the South part of the house of the plaintiff in the writing of the award aforesaid mentioned *a datu scripti arbitrii prædicti* by the space of 58 days *et ultra ibidem continuavit, et hucusque continuare permisit, contra formam et effectum arbitrii prædicti, et hoc, &c.* To this the defendant demurred. And the plaintiff

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(3) Acc. 5 Co.
78. a. Cro. El.
432.

(b) Acc. Str.
3024.

plaintiff joined in demurrer. This case was argued by Mr. Mountague and Mr. Raymond for the defendant; and by Mr. Broderick and Mr. Eyre for the plaintiff. And the exceptions insisted on were, that the award was uncertain, both as to the time when it should be performed, the scaffolds by the award being to be pulled down within 58 days from the date of the award, and it does not appear any where in the plaintiff's replication, that the award had any date, neither indeed had it any; and also the award does not appoint who shall take the scaffolds down. And this is as uncertain as *Salmon's case*, 5 Co. 77. b. Cro. Eliz. 432. *Moor* 359. where the award was naught, for not appointing in what sum the person should be bound. And yet Mr. Raymond said, a covenant or promise to enter into a bond, that the obligee shall enjoy certain land (which was to have been the condition in *Salmon's case*) or for payment of money to the obligee, without mentioning in what sum the bond shall be, is (a) good; and it shall be understood according to common intendment; and in the one case shall be to the value of the land, and in the other double the money to be paid. But it is otherwise in cases of awards, which must be final, and where no averment or intendment can be admitted to supply the defect of certainty, and make it good, as may be done in those other cases: and this is the standing difference. And so is 5 Co. 78. a. *Salmon's case*. And awards have been held to be naught for the like uncertainties, as the case of *Mussey and Aubrey*, 1 Roll. Abr. 264. *Stiles* 365. where in an award between landlord and tenant, the arbitrators awarded among other things, that the tenant should pay the landlord the arrears of rent since the landlord's purchase, and because it was uncertain what that was, and the tenant could not come to the knowledge of it, but at the curtesy of the landlord or the vendor, the award was held to be naught. So the case in 2 Cro. 314. an award that A. shall give security to B. for payment of 16*l.* at two days, was held to be (b) void for the uncertainty what security it should be, whether by bond or otherwise. And though it is true, that an award may be good in part, and void in part, yet the breach being assigned in the non-performance of this part of the award, if this be void he can never have his judgment. Another objection was, that the arbitrators had made their award of a matter that was not submitted to them, and so had exceeded their authority. For it did not appear that the plaintiff's house, &c. were within the precinct of the hospital of *Bridewell, London*; and though the award was pleaded to be made *de et super praemissis*, yet that would not help it. And to this purpose the case in *Dyer* 242. was cited: where a submission to an award was for and concerning the right, &c. of a certain parcel of land containing by estimation 200 acres *vacatas Helfhorne Linge*, &c. the arbitrators awarded, that in

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in the waste lands of the vill of *Helstorne*, the defendant should have the brakes there growing during his life, &c. and in the replication, setting out the award, there was an averment, that the parcel of land, where the brakes grew, is the said parcel of land called *Helstorne Linge*, for the right, &c. of which the parties submitted to the award; and the award was held to be naught, for this among other reasons, because it was not of the matter in submission, nor of any generality that comprehended it; but of another matter. And the averment of the party cannot expound the intent of the arbitrators. Another objection was, that the award was not mutual, for that every thing, that was awarded to be done, was for the benefit of the plaintiff, and there was nothing awarded to be done for the defendant. There was another objection by Mr. *Mountague*, that the award was uncertain, because it did not appear, how many deals there were, nor whose they were; and that the arbitrators had exceeded their authority, by awarding, that no more scaffolds should be erected, nor deals piled, between the river *Thames* and the house of the plaintiff, &c. for the future; it being only past differences upon occasion of nuisances by past erections, which were submitted to them; and that what was awarded for the defendant's benefit, viz. that the plaintiff's balcony should be taken down, was not awarded positively, but conditionally, if the defendant think fit. And in another part of the award, where it was awarded, that the defendant *permitteret et toleraret* the plaintiff *habere liberam viam sive transitum, Anglice* a passage, *ad et ab* a stable and hay-loft, &c. it was uncertain; because it was not said, what sort of a way, whether with carts and carriages, or on foot. To these objections it was answered, that if the award had no date, then the words within 58 days *a datu* must be from the delivery, and so the time will be certain enough. For there is an averment in the replication, that the award was delivered, one part to each of the parties, on the 9th of *October* 1702. Besides, the award is pleaded to have been made the same day, and that must be taken to be the date, and that it bore date that day. As to the uncertainty of the person, who is to take them down, that is not a sufficient uncertainty to vitiate the award. And as for those cases cited by Mr. *Raymond*, they are uncertainties in the thing that is to be done; this is an uncertainty only of the person that is to do the thing, and not of the matter to be done as those. But if the uncertainty would vitiate the award, here is no uncertainty; for taking the whole award into consideration, it appears plainly, that it was the defendant *Breame's* ground. And that appears first from that clause of the award, whereby it is awarded, that the defendant shall use the ground between the *Thames* and the *South* side of the plaintiff's house, as a wharf; secondly, by that clause about the drain and water-pipe, wherein it is expressly

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expressly said, that the wharf of the South side of the plaintiff's house is the defendant's wharf; and the wharf being the defendant's, he must be taken to be the person who did the nuisance, by erecting the scaffolds and piling up the deals upon the wharf. And then the case is no more than if a debtor, or a creditor, should submit to an award, and the arbitrators should award, that the debt should be released, or that it should be paid, that would be an express award that the creditor should release in the one case, and the debtor pay in the other. So here the defendant appearing to be the person that had done the nuisance, the award, that it shall be taken down, is an express award, that he shall take it down. Also no body else can do it, because by coming on the defendant's ground the plaintiff would be a trespasser. As to the objection, that it does not appear, that the house is within the precincts of Bridewell hospital, the averment that the award was made *de et super præmissis*, will help that. As to the case in *Dier*, that was a plain variance appearing upon the face of the award; but otherwise, if there be nothing appearing upon the award itself, which shews it to be a matter out of the submission, the court will take the award to be of the matters in difference. *Baspole's case*, 8 Co. 97. *Hob.* 191. 2 *Saund.* 184. 2 *Ventr.* 242. As to that objection, that nothing is awarded for the defendant, there is that, that he shall use the ground as a wharf, and that the balcony shall be taken down, if he pleases. And the addition of it, if the defendant pleases, makes no difference, because that is no more than the law says; as if an award were to pay money, if the other pleased to receive it, that would be well. Then an exception was taken to the plea, that the defendant pleaded generally, that he *produxit*, &c. to the arbitrators, &c. *dismissionem et potestatem per quas idem* the defendant *tenuit ejus partem præmissorum, scilicet omnes evidencias suas et totum titulum suum adinde*, &c. whereas he should have set out the lease particularly and certainly, that the court might have adjudged, whether it were a good lease or no.

It was replied on the part of the defendant, that there could be no difference between an uncertainty in the thing to be done, which was admitted by the counsel for the plaintiff to be naught, and an uncertainty in the person, who was to do the thing; for the thing could not do itself. And that the wharf did not appear to be the same wharf, but might be another: and as to the fault in the plea, that was now out of the case, by the plaintiff's replying and assigning an insufficient breach. And it was compared to *Turner's case*, 8 Co. 133. b. if the defendant pleads an insufficient bar, yet if by the plaintiff's replication it appears, that he has no cause

(a) Acc. 3

Co. 52. 8 Co.

120. b. Palm. 287. 2 Bull. 94. Cro. Jac. 133. 223. Litt. Rep. 172. Moore 464. 2 Bull. 94.

1 Sid. 336. Hob. 199. Hardr. 32. Sty. 354. Arg. post 1097. Vide post 1372.

in

in debt upon a bond to perform covenants, the defendant pleads an ill bar, and the plaintiff replies, and assigns a breach, which of his own shewing appears to be no breach, the defendant shall have judgment. So here the plaintiff having assigned his breach in a part of the award which is void, he shall never have judgment, though the plea were admitted to be insufficient, because he has no cause of action.

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As to the main objection, which was that it was not awarded, who should remove the deals and scaffolds, the three justices were against the chief justice. The chief justice was of opinion, First, that it did not appear that the wharf was the defendant's ground; all that appeared was, that the defendant was to use the ground as a wharf, which did by no means imply, that he was to have the ground, being but a liberty, but rather the contrary. And besides, if it had appeared, that would not have been sufficient, because it ought to have been averred in the replication, and which was the second reason the chief justice gave, because it did not follow, though it were the defendant's ground, yet that he was bound to remove the deals, unless he had been awarded to do it. For the deals lying there being a nuisance to the plaintiff, he might lawfully remove them.

Powell justice held, that as a plea in bar should be taken to a common intent, so a *fortiori* should an award, and that one part of an award might explain another. That it appeared here plainly upon this award, that here were several nuisances done by one neighbour upon his ground to the prejudice of another; and that these differences were submitted by them to arbitrators, to be determined in an amicable way. And therefore when the arbitrators come to award, that the nuisance shall be removed, it must be understood, that it shall be done by him that is owner of the ground, and did the nuisance; for though any person, or the plaintiff, might remove the nuisance, yet that shall never be intended to be the design of the arbitrators, who intended to make an amicable end of this difference. And he resembled this to the case of 9 *Edw. 4. 3. b.* where the condition of an obligation was, that the great bell of *Mil-den-hall* should be carried to the house of the obligee in *N.* at the costs of the men of *M.* and there weighed and melted down, in the presence of the men of *M.* and the obligee should make of it a tenor, &c. though it was not said who should weigh the bell, yet it was adjudged that the brasier, who was the obligee, should do it, because it belonged to his occupation to do it. So here the owner of the land is the properest person to remove the scaffolding. Besides, if a man were bound in a bond, conditioned that such scaffolding in his ground to the nuisance of the obligee's house should be taken down by such a day; the obligor would be bound

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to take it down. So here in the same manner, the condition of the bond being for performance of an award, and the award being that the scaffolding shall be taken down, the award is parcel of the condition of the bond, and will have the same effect as if it had been inserted in the condition. The other justices were of the same opinion, that it did appear, that the wharf was the defendant's, and therefore he ought to take down the scaffolds, &c.

As to the exception of the uncertainty of the time when the scaffolds were to be taken down, the court held, that that was certain enough; for if the award had no date, the time must be computed from the delivery, and that was one sense of *datum*; they held also, that the award was mutual, and that the defendant's plea was well enough; for he was only to produce such a lease as he had. They held also, that the number of deals was not material; and that the awarding, that no more deals should be erected for the time to come, would do no harm, for it did not bind the inheritance, but was void as to that. And if any of the other exceptions were material, yet an award might be good in part and void in part, and the breach being assigned in a part of the award which was good, the plaintiff ought to have judgment. And judgment was given for him by three judges against the chief justice. Afterwards error was brought on the judgment in the exchequer chamber, but before argument the parties agreed.

The Queen *vers.* Sir Jacob Banks.

If the prosecutor removes an indictment from the sessions into B.R. the defendant cannot carry it down to trial the assizes next after the removal. S. C. 21 Mod. 33. 6 Mod. 245. Salk. 652. And a trial thereupon will be void, tho' the attorney general shall grant a *nisi prius*. S. C. 21 Mod. 33. 6 Mod. 245. 'Tis not a sufficient reason for a trial at bar that the prosecution on an indictment for an assault in the queen's palace whilst the queen was sitting in council there, unless it is carried on by the direction of the crown,

THE defendant was indicted before the justices of peace in their sessions, for assaulting *Colepepper cum baculo* in the queen's palace *prope regiam personam, eadem domina regina existente in concilio circa ardua regni*. This indictment was removed into the king's bench by *certiorari* by the prosecutor, and the defendant pleaded the last day of the last term, and carried the record down to trial, and at the assizes the prosecutor would not proceed, and the defendant was acquitted for want of prosecution. And now this term the prosecutor moved the court for a new trial, because no *nisi prius* with a *proviso* can be where the queen is sole party, 1 *Keb.* 195. That a trial cannot be by *proviso* against the king. And though a cause where the king is party may be carried down to trial by either party by consent, as is 1 *Keb.* 195. yet without such consent, it cannot be carried down till after a default made by the king, and not then neither without leave of the court, or the consent of Mr. Attorney, and so is 1 *Keb.* 525. Of the other side it was urged for the defendant, that the course of the court was, in

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case the defendant removed the indictment by *certiorari*, he was bound to carry it down to trial at the next assizes. If the prosecutor removed, the defendant might carry it down to trial at the next assizes at his election; that he was not bound by recognizance to do it, as in case where he removed the indictment himself, but yet he had his election to do it; and that the reason of this was, because his not proceeding below was in nature of a default, and so within the same reason, as where a prosecutor slips an assizes: that an indictment being found upon the oaths of the county, was a heavy charge upon a man, and therefore the law indulged the defendant, that he might have a speedy trial, to acquit himself of it. That this could be no inconvenience to the queen, because the defendant could not have a *nisi prius* and a *talis* without Mr. Attorney's consent, who would not grant it unless he were ready; and that in case it were to be tried at the bar, there would be time to apply to the court for the queen to put off the trial, in case she were not ready. It was said, they had searched for precedents, and that there could not be any ancient ones, because, before the late statute 5 Will. and Mar. c. 11, it never appeared who brought the *certiorari*; but since that statute they had some, (as I think four or five) where the defendant had carried it down to trial the first assizes, and no exception had been taken. That all the practisers agreed that to have been the practice, and that upon their having been so informed by them they had carried the cause down to trial.

As to the precedents it was said for the prosecutor, that they were late, and all since the late act of parliament 5 W. and M. c. 11, and that it might have been by consent, and that they differ from this case, because the defendants pleaded early in the term.

This cause was stirred three times, and much laboured of both sides, and at last all the court agreed, that there should be a new trial, because there was no reason, why the queen should be more hastened in her prosecutions than every private plaintiff. And as to the precedents, they passed *sub silentio*, and therefore were of no weight. And they made a rule for the settling this matter for the future, that the defendant should not carry down the cause to trial in such a case as this, without the leave of the court upon motion in court; and that they to be sure would never grant leave, till after a default by the queen.

The defendant in an indictment removed by the prosecutor shall not carry it down to trial without leave of the court on motion.

There were many things said in the argument of this case by the chief justice, and *Powell*; as that a trial by *proviso* could not be against the queen, and *Powell* gave the reason, because a *proviso* implies a *laches*, which cannot be in the queen; and the chief justice said, that it was not a trial by

A cause at the suit of the crown cannot be carried down to trial by proviso. S. P. 6 Mod. 246. Salk. 652.

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proviso no more than a trial brought on by the defendant in a replevin, *quare impedit*, attachment *sur prohibition*, where both parties have a liberty of carrying the cause down to trial. The chief justice said also, that if an indictment be found in the king's bench, the defendant by the course of the court is bound in a recognizance to carry the cause down to trial. And so if an indictment be found in the country, and the defendant pleads and tries it there, they bind him by recognizance to bring it on to trial at his own charges. But where an indictment is removed by *certiorari* by the prosecutor, the defendant is *sine die*, and need not come in till process goes out against him (though he may come in if he will) and he is not bound by recognizance to carry the cause down to trial. And it was all one before the statute 5 Will. and Mar. c. 11. where an indictment was removed by *certiorari* by the defendant out of a foreign county; for the defendant was *sine die*, and the common course was to outlaw him if he did not come in: but that was found inconvenient, and therefore the act was made. But before the act 5 Will. and Mar. c. 11. in London and Middlesex in cases of indictments found there, if the defendant brought a *certiorari*, he was bound in a recognizance to carry it down to trial the next term, or the sitting after the term; and the same rule was made after the revolution, and before the act, in relation to a *certiorari* granted into foreign counties. And therefore the difference between a *certiorari* by the defendant and the prosecutor (which is given as a reason why there can be no ancient precedents) is of no weight, because it was all one which party brought the *certiorari*, because the defendant was not bound to carry it down. And as to the default, that is not so, for indictments cannot be found any where but in the county; and therefore probably this indictment might be found on purpose to be removed. As to the precedents they all passed *sub silentio*, and are all of late date, since Hil. 9 Will. 3. Powell seemed to think at first, that Mr. Attorney's granting a *nisi prius*, was a consent to the trial, and that that would make it good. But the chief justice and he agreed, that it was only a consent to the manner of the trial. And Mr. Attorney declared to the same effect in court.

After this rule made in his favour, the prosecutor moved for a trial at bar, because the fact was done in the queen's palace, whilst her majesty was in council; and that was opposed, because the queen had given no direction for the prosecution, but the prosecutor carried it on merely on his own account. And when upon his petition her majesty had referred the matter to the board of Green Cloth, the prosecutor had declined procuring their report, and had proceeded in this manner. And after this matter had been twice moved, and Mr. Attorney being present in court, and declared that he had no directions to prosecute, the matter was compromised

mised by consent, that the trial should be at the assizes, but that the high sheriff should return 48 jurors in the presence of the prosecutor and the defendant, and they to strike out twelve a-piece, &c. The last day of Trin. term the prosecutor moved the court to set aside the rule, pretending he did not hear the judges; but Holt chief justice reprehended him for the singularity of his proceedings (which were very reprehensible) and told him he would not set aside the rule. Then he said, that he must have a trial at bar. But the chief justice said, there was no reason for it, it appearing to them to be a private prosecution. And at length the first rule stood.

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Note, At the assizes the defendant was acquitted, as were also Mr. Knatchbull and Mr. Scott, upon an indictment preferred against them by the same prosecutor for another branch of this quarrel, the prosecutor being, as it seems so unfortunate, as by his indiscreet warmth and violence of temper to have lost the good opinion of, if not all credit with, the sober part of mankind.

Buckmyr vers. Darnall.

S. C. 6 Mod. 248. Salk. 27. 3 Salk. 15. Holt. 606.

AN action upon the case wherein the plaintiff declared, that the defendant, in consideration the plaintiff, at his request *locaret et deliberaret cuidam Josepho English* a gelding of the plaintiff's *ad equitandum et itinerandum usque ad Reading in comitatu Berks, assumpsit et promisit* the plaintiff, *quod* the said Joseph and Charles the said gelding to the plaintiff *redeliberarent*, &c. Upon *non assumpsit* pleaded, this cause came to trial before Holt chief justice, at Westminster-Hall; and the counsel for the defendant insisting, that the plaintiff ought to produce a note in writing of this promise within the statute of frauds 29. Car. 2. c. 3. §. 4. and the chief justice doubting of it; a case was made of it, and ordered to be moved in court, to have the opinion of the other judges. And now it was argued this term by serjeant Darnall for the defendant, and by Mr. Raymond for the plaintiff. And it was insisted for the defendant, that this case was within the statute of frauds, 29 Car. 2. c. 3. §. 4. for it was a promise to answer for the default and miscarriage of the person the horse was lent to. The very letting out and delivery of the horse to English implies a contract by English to re-deliver him, and he is bound by law so to do, and consequently the defendant is to answer for the default of another. In a case 2 Will. and Mar. your lordship settled this rule, that where an action will lie against the party himself, there an undertaking by J. S. is within the statute; and where no action will lie against the party him-

A promise that a third person shall do an act, for the non-performance of which he would be liable to an action, is not binding, unless it is in writing. Vide 1 Will. 30. 2 Will. 94. 308. Burr. 1386. ante 214. 2 T. R. 80. H. Bl. 120. 1 Vent. 43. 1 Will. 305. 2 Will. 94. A promise that a third person shall redeliver a horse, in consideration that the person to whom the promise is made will lend him at the request of the person making it to such third person is not binding, unless it is in writing. Where an action will lie against the party himself, an undertaking by a third person

for his performance is within the statute; but where no action lies against him it is otherwise.

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himself there it is otherwise. And therefore I agree this case, that if a man should say to another, do you build a house for J. S. and I will pay you; that case is not within the statute, because there J. S. is not liable. But this case is not more than this, if a man should say, do you let J. S. have goods, and if he does not pay you I will, and this is within the statute because an action will lie against J. S. for the money for the goods. Or if a man should say, take J. S. into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible, that is also within the statute.

To this it was answered for the plaintiff, that here the credit was wholly given to the defendant; that that rule of the serjeant's must be understood, where an action does or does not lie against the party himself on the contract, and not where an action does or does not lie against him upon collateral respects. And therefore in this case for an actual conversion, or for refusing to re-deliver the horse, *English* may be charged in *trover* or *detinue*; yet he being not chargeable upon the contract, the case is not within the statute. This contract cannot be said properly to be a promise to answer for the default or miscarriage of another, unless *English* were liable by the first contract.

Upon the first motion and arguing this case, the three judges against *Powys* seemed to be of opinion, that this case was not within the statute, because *English* was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And *Powell* justice said, that that rule, of what things shall be within the statute, is not confined to those cases only, where there is no remedy at all against the other, but where there is not any remedy against him on the same contract. This case is just like the case where a man says, "send goods to such a one, and I will pay you;" that is not within the statute, for the seller does not trust the person he sends the goods to. So here, the stable-keeper only trusted the defendant, and an action on the contract will not lie against *English*, but for a *tort* subsequent he may be charged in *detinue*, or *trover* and conversion, which is a collateral action.

Powys justice said, that there was a trust to *English*, for the very lending of the horse necessarily implies a trust to the person he is lent to, and consequently the defendant in this case is to answer for the default of another, and is within the statute.

Powell justice agreed, that if a man should say, lend J. S. a horse, and I will undertake he shall pay the hire of it; or send

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J. S. goods, and I will undertake he shall pay you; that those cases would be within the statute: and agreed with Powys, that if any trust were given to *English*, then the case would be within the statute. But he and the chief justice and Gould held, that here was no credit given to *English*; and the chief justice agreed with him, that if there had, this promise would have been but an additional security, and within the statute. And the chief justice said, that if a man should say, "let J. S. ride your horse to *Reading*, and "I will pay you the hire," that is not within the statute, no more than if a man should say, "deliver cloth to J. S. and "I will pay you." He said also, that a bailee of an horse for hire is not bound to re-deliver him at all events, but if he be robbed of him without fraud in him, he is excused. And so it was ruled in the case of *Coggs v. Bernard. ante* 916.

The last day of the term the chief justice delivered the opinion of the court. He said, that the question had been proposed at a meeting of judges, and that there had been great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion, that the case was within the statute. The objection that was made was, that if *English* did not re-deliver the horse, he was not chargeable in an action upon the promise, but in *trover* or *detinue*, which are founded upon the *torr*, and are for a matter subsequent to the agreement. But I answered, that *English* may be charged on the bailment in *detinue* on the original delivery, and a *detinue* is the adequate remedy, and upon the delivery *English* is liable in *detinue*, and consequently this promise by the defendant is collateral, and is within the reason, and the very words of the statute; and is as much so, as if, where a man was indebted, J. S. in consideration that the debtor would forbear the man, should promise to pay him the debt, such a promise is void, unless it be in writing. Suppose a man comes with another to a shop to buy, and the shopkeeper should say, "I will not sell him the goods, unless you will undertake he shall pay me for them," such a (a) promise is within the statute: otherwise, if a man had been the person to pay for the goods originally. So here, *detinue* lies against *English* the principal; and the plaintiff having this remedy against *English* the principal, cannot have an action against the defendant the undertaker, unless there had been a note in writing.

(a) Vide 1 T.
R. So. H. Bl.
120.

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If an insolvent act directs that if any person who shall be discharged under it shall be arrested for a debt contracted before a certain day, he shall be released on common bail, but provides that no person shall be discharged under it who shall stand charged and indebted in more than 100*l.* to one person, and a man is discharged under it for a debt below 100*l.* and then arrested for a debt exceeding that sum contracted before the day mentioned in the act, he is not intitled to a release on filing common bail.
D. acc. post 1196.

THE defendant being in custody at the suit of a man, to whom he was indebted under 100*l.* was discharged upon the act of 2 & 3 Ann. c. 16. and after he was so discharged was arrested at the plaintiff's suit, to whom he was indebted before the eighth of *November* in above 100*l.* And the question was, whether he should be discharged upon common bail? And the question arose upon this *proviso* in the act of parliament: provided, &c. that no person, &c. by virtue of this act shall be discharged out of prison, who shall stand charged and indebted in more than the sum of 100*l.* to any one person, principal money and damages. All the judges of *England* had a meeting to consider of this act of parliament, and it was resolved by them all, that the defendant was not within the act to be discharged upon common bail. The chief justice said, that it might seem a doubtful question on these words of the act, "that if any person, &c. discharged by virtue of this act, shall, &c. after his, &c. discharge, &c. be again arrested or detained for any debt or debts, action, &c. upon the case, duty, sum or sums of money whatsoever, contracted or due before the said eighth of *November*, that then upon doing so and so they shall again be discharged, &c. by any two or more of the said justices of the peace, &c." upon filing common bail; but then the *proviso* must be considered: that says, "no person by virtue of this act shall be discharged out of prison, &c." but common bail is a discharge by virtue of that act, and therefore the defendant cannot be discharged upon common bail, for that is one discharge by the justices. And it is a reasonable construction, to apply the word discharged in the act to the second discharge as well as the first. And the reason of the thing makes for this construction, for the intent of the act was, that no body should have the benefit of the act originally, that was in custody for above 100*l.* And the same reason holds when you come to a second discharge, for that is a discharge by virtue of the act; and the *proviso* is, that nobody shall be discharged by that act, that owes above 100*l.* And this is the most reasonable construction of the act.

If a statute empowers justices of the peace to release on common bail persons who have been discharged under an insolvent act, the judges of the superior courts may release them.

There was another question stirred in this and several other cases this term, upon the words of the clause for discharging, that appoints it to be done by two or more of the said justices of the peace; whether the court of king's bench, and the other superior courts, could discharge the prisoners upon common bail; or whether they must resort to the justices of the peace? And it was at the same time resolved, that where the prisoners were intitled to

be discharged on common bail, the courts of *Westminster* could discharge them, and they were under no necessity of applying to justices of peace.

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The judges took notice, that it was an obscure act of parliament. They said, that the fairest construction was, that the discharge should be good against all persons, to whom the prisoner was indebted under the sum of 100*l.* and void to all above. For it would be a ridiculous construction, to make the discharge in the principal case good against all. For it is ridiculous, that if a man is in prison charged with above 100*l.* he shall be kept in prison; and yet if his creditor happen not to have arrested him, he shall be discharged against him, though he owes him above 100*l.* And of the other side, to make the discharge totally void, would be very inconvenient; for that would make the justices liable to an escape, if they happen to discharge a man, who owes any body above 100*l.* and yet it is impossible for them to come by the notice of it, because the creditors are not directed to be summoned. And *Powell* justice said, that the word [and] must be construed [or]; and so the *proviso* will be, charged or indebted.

Tenant *vers.* Goldwin.

Declaration post vol. 3. p. 324.

AN action upon the case, wherein the plaintiff declared, *quod cum* the plaintiff 1 Octob. primo, et abinde semper hucusque, possessionatus fuit, et adhuc possessionatus existit, de uno mesuagio jacente et existente in Fish-street, in parochia sanctæ Annæ, infra libertatem Westmonasterii et comitatum Middlesexiae, pro quodam termino nondum finito, ac in cellario suo parcella mesuagii sui prædicti reponere et conservare solebat carbonum et illupulatae cervisiae copias pro usu familiae suae, necnon ad vendendum et merchandizandum diversis personis, quae de ipso commoditates prædictas emere solebant in mesuagio suo prædicto, ad ipsius the plaintiff's non modicum proficuum et utilitatem: quod quidem cellarium contigue adjacet, et per totum tempus prædictum contigue adjacebat, mesuagio prædicto of the defendant in parochia prædicta, et de forica parcella prædicti mesuagii the defendant separari et vallari solebat per murum crassum et compactum, qui ad dictum mesuagium præfati the defendant pertinet, et per præfatum the defendant per totum tempus prædictum jura debuit reparari: prædictum tamen the defendant præmissorum non ignarus, sed machinans et fraudulentè intendens ipsum the plaintiff in hac parte minus rite gravare, et ipsum the plaintiff de usu et commoditate cellarii mesuagii sui prædicti totaliter deprivare, et de proficuo commercii sui prædicti impedire, eodem 1 Octob. primo, et ab inde hucusque, murum prædictum, licet saepius requisitus eundem reparare, scilicet per

If a house of office is separated from other premises by a wall, and that wall belongs to the owner of the house of office, he is of common right bound to repair it. S. C. Salk. 21. 360. 6 Mod. 311. Holt 500.

And in a declaration against him for not repairing an allegation, "that he of right ought to repair" is unnecessary.

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ipsum the plaintiff eodem 1 October primo in parochia prædicta, tam negligenter custodivit et reparavit, quod ob defectum debitæ curæ et reparationis ejusdem muri foeditates et sordida foricæ prædictæ de eadem forica per decasum et fractionem muri prædicti in cellarium prædictum ejusdem the plaintiff fluebant, et cellarium prædictum inundabant, scilicet in parochia prædicta per totum tempus prædictum, per quod ipse idem the plaintiff usum cellarii sui et proficuum commercii sui prædicti per totum tempus prædictum perdidit et amisit: unde idem the plaintiff dicit, quod deterioratus est, et damnum habet ad valentiam 100 l. et inde producit, &c. The defendant let judgment go by default, and a writ of inquiry of damages was awarded, and damages assessed to 6 l.

Mr. Salkeld. The objection that has been made in arrest of judgment is, that here the defendant being terre-tenant, and this declaration being to put a charge upon him, the plaintiff ought to shew a title to charge him, and this general way of declaring with a *separari solebat*, and a *jure debuit reparari*, is ill. In answer to this I shall first shew, that there have been cases, where the plaintiff has by his declaration put a charge upon the terre-tenant in as general manner as this, without shewing any title: secondly, that we have no need to carry the matter so far, but are within the stated rule; that where the charge is within common right, there need be no title shewn: and thirdly, that this is a trespass to the plaintiff. As to the first, he cited the case of *Sands and Tresfuss*, 1 Cro. 575. where the plaintiff declares, that he was seised in fee of a mill, and had a water-course running in the defendant's land to the said mill, and that the defendant had stopped it. And this was held well upon demurrer without shewing any title to the water-course. And 3 Lev. 266. where the plaintiff declares, that he was for four years last past seised in fee of a parcel of land adjoining to the meadow of the defendant, *et sic inde seisitus per totum tempus prædictum habere frui et uti debuit quandam viam per quandam januam* of the defendant, in the meadow of the defendant *usque a close* of the plaintiff, and that the defendant stopped the gate *cum fera et catena*, and upon a judgment by default, and writ of inquiry of damages, and motion in arrest of judgment, this declaration was held to be good, though no title was shewn to the way, and though the defendant was terre-tenant, and though the charge was against common right, and such a charge as could not commence but by grant. And the same was ruled upon demurrer between *Warren and Saunthill*, the same book cited in the case before, which was the case of *Winford vers. Woolloston*. (Note, there is also another case in 1 Lutw. 119. *Blockley vers. Slater*, where the plaintiff in his declaration claims a way through the defendant's

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defendant's close, and yet declares only generally, *quod habuit et per totum tempus prædictum habere debuit*; and adjudged good upon special demurrer, and that matter shewn for cause; which was held also in the case of 3 *Lev.* before. Secondly, he said, that where the charge was with the common right, there the plaintiff in his declaration need never shew any title. And therefore in an assise for a rent-service against the terre-tenant the plaintiff in the assize need not make any title to the rent; otherwise in an assize for a rent-charge, or any thing else which is against common right. So is 32 *Hen. 6. 15. a.* 35 *Hen. 6. 7. b.* And the same difference is between an assise for a common appendant, and in gross; and so of all charges by act of law. But where the assise for the rent is brought against the *pernor* of the profits, though it be for a rent charge, there need be no title shewed, as must if the defendant be terre-tenant. So an indictment against the hundred for such a matter as they are chargeable with of common right, generally is good; but if you would indict a private person for such a matter, you must shew specially in the indictment, how he comes to be chargeable to do it. So if you would charge a private person for not repairing a highway, or a church wall, &c. you (a) must shew some special matter to charge him. But here the defendant is bound of common right to repair his own house, so far as that it shall not prejudice his neighbour, or the publick. And in the case of the queen *vers. Watson*, ante 856. the indictment was against the defendant, that he did not repair his own house. And hence it is, that at common law, if two jointenants are of a wood or arable land, one cannot compel the other to repair the fences. But if two jointenants are of a house, and the one will not repair it, the (b) other shall have a writ *de reparatione facienda* against him, and the writ supposes, that *ad reparationem et sustentationem ejusdem domus tenetur*. Moor 374. 11 Co. 82. b. 2 Inst. 403. Reg. 153. b. n. 6. 127. a. b. So if a man have a house near to the house of another, and he suffers his house to be so ruinous, as it is like to fall upon the house of the other, he may have a writ *de domo reparanda*, and compel him to repair his house. And the writ says, *quæ reparari debet et solet*. Reg. 153. b. n. 6. 127. c. d. C. L. 56. b. and though the word *solet* be in, the Register says, that may be left out, *quando casus requirit*. (Note, in my Register this note follows another writ). Reg. 153. b. So (c) if a lessee for years build a new house, where there was none before, it is waste; but if he lets it fall down, it is waste too. And if one man have the upper part of a house, and the other the lower, they may each compel the other to repair his part, in preservation of the other's. And if either of them neglect so to do, an action upon the case lies against him. Keilw. 98. b. pl. 4. It may be, if a man should build a new house near an old one,

(a) Vide ante
792. 804.
1 Hawk. c. 76.
f. 8.

(b) Acc. Co.
Lit. 54. a.
Vide Keilw. 98.
b. pl. 4.

(c) Acc. Co.
Lit. 53. a.

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one, or a new cellar under an old wall, the other might not be bound to maintain his old house or wall. He said, that the *fordes* coming out of the defendant's *forica* into the plaintiff's cellar was an actual trespass. And for that he compared it to the case of 6 *Edw. 4. 7. Fitz. Tresp. 110.* where in trespass the defendant pleaded, that he was seised of an acre of land, upon which a hedge of thorns is growing, which joins to the place where, &c. and the defendant came, and at the time of the trespass out the thorns, and they *ipso invito ceciderunt* in the place where, &c. and the defendant came recently, and took them away, &c. and upon demurrer *Choke* held, that the thorns falling into the close of the plaintiff was a trespass; and to say they did so *ipso invito* was no plea, unless he had said also, that he could not have cut them in any other manner, or that he did all that was in him to have kept them from falling in; for otherwise the first act being a wrong, the defendant could not justify entering into the plaintiff's close to take the thorns out. Otherwise if a tree of the defendant's had by the act of God, by a storm, been blown into the close of the plaintiff.

The last day of the term *Holt* chief justice delivered the opinion, of the court, that the declaration was sufficient. He said, that upon the face of this declaration there appeared a sufficient cause of action, to entitle the plaintiff to have his judgment: that they did not go on the word *solebat*, or the *jure debuit reparari*, as if it were enough to say, that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. And this case differs from the case of a *curia claudenda*, in which it is necessary to lay a prescription, because there the fence is for the use of both parties. But the reason of this case is upon this account, that every one must so use his own, as not to do damage to another. And as every man is bound so to look to his cattle, as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office, that it may not flow in upon and damnify his neighbour. If a man has two houses contiguous, and one has a house of office, which is separated from the cellar of the other by the wall, which keeps in the filth of the house of office, and he sell that house, the vendee must keep in the filth of the house of office, so as it shall not run in upon the other house. So if a man has two pieces of pasture, which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is, because every man must so use his own,

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as not to damnify another. And it would have been all one if the vendor had sold the house with the cellar, then he must have kept the wall of the house of office so as to have kept the filth in; for every man must take care to do his neighbour no damage. If a man erects a house and a house of office, and the house of office adjoins to a vacant piece of ground, which keeps in the filth of the house of office, if the owner of the vacant piece of ground will dig a cellar there, he must make a wall to the house of office. And so if the waste piece of ground belonged to the same person that built the house, and he sold the vacant piece of ground; his vendee, if he would dig a cellar by the house of office, must build a wall to it. But that is matter of which the defendant may have advantage of upon the trial, and if that should appear to be the case upon the evidence, the defendant ought to be acquitted. As to the case of *Palmer and Fletcher*, 1 Lev. 122. 1 Sid. 167. 227. If indeed the builder of the house sells the house with the lights and appurtenances, he (a) cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee.

(a) Vide
1 Vent. 239.

But if he had sold the vacant piece of ground, and kept the house, without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights. I do not approve of the case in *Keilway* 98. b. pl. 4. and the law seems to be doubtful in that point. In *Fitz. N. B.* 127. l. there is a writ to that purpose, but the writ is grounded upon the custom of the place, and not upon the common law. And there is such a custom in many places, and there is no other authority for it. But this case differs from that, for here the defendant, by using his own, does a damage to the plaintiff.

Afterwards towards night Mr. *Southouse* moved the court, that they would not give judgment for the plaintiff in this case, there being an irregularity in making up the writ of inquiry; for whereas the declaration delivered was *jure debuit reparari*, which was nonsense, they had made it in the writ *reparari*. But the court refused the motion, for they said, it was not material, that being only a consequence of law upon the matter appearing in the declaration, and consequently not material, whether it were in or out. And the same was held by *Powell* of the *solebat*. Upon the argument of this case the chief justice said, that where a man has a way, or any other incorporeal right, in an action for disturbance it is enough to say, *habuit et habere debuit*. The first case of this sort was before chief justice *Hale*: and he held, that it might be good upon demurrer, if the defendant did not appear to be terre-tenant. But since, it (b) has been held to be good both ways. But there is no case where that has been held well, where the plaintiff

(b) Vide ante
751. and the
books there
cited.

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(a) Vide Cro.
Car. 359.

plaintiff has no hereditary right, but does merely put a charge upon another.

Powell said, that *currere consuevit* had (a) been held well enough in case of a water-course, because that must be time immemorial. The chief justice and *Powell* held, that a man cannot build so near another man's house as to throw it down.

Regina *vers.* Saxfield.

A Writ of error of a judgment upon an indictment against the defendant for being a common scold: the word in the indictment was *rixa*, which was objected by the counsel for the defendant, not to signify a scold, but *rixatrix*. And for this exception the judgment was reversed. Now the law being in *English*, the like blunder can hardly happen again.

Intr. Trin. 3
Ann. B. R.
Rot. 185.

The word *prædictus* where it might refer to several persons, shall refer to him to whom upon the context it appears most applicable.

Fitzhugh *vers.* Dennington.

A Writ of error out of the *Marshalsea* court of a judgment in an action of debt upon a bond of 20*l.* by the plaintiff as administrator of one *Bennet*. The defendant prays *oyer* of the bond, and of the condition, and that appears to be, reciting, that whereas *Bennet* had put one *John Dennington* son of *John Dennington* to be an apprentice to the defendant for the term of seven years, if the defendant, his executors or administrators do or shall at the end of the seven or eight years next ensuing the date hereof in due form of law, and according to the use and custom of the city of *London*, make or cause or procure to be made the said *John Dennington* a freeman, or to be made free of the company of joiners in *London*, if it shall be desired, that then, &c. and pleads in bar that the defendant *ad vel post finem septem annorum proxime sequentium datum scripti obligatorii prædicti, et ante ligationem quærelæ* of the plaintiff, *nunquam requisitus fuit ad faciendum, vel procurandum prædictum Johannem in conditione prædicta superius nominatum fore factum liberum habitantem, Anglice a freeman, vel liberum, Anglice free, de societate, Anglice company, juncturam, Anglice joiners, civitatis Londinensis, secundum formam et effectum conditionis prædictæ, &c.* The plaintiff demurred, and judgment was given below for the plaintiff. And the plaintiff in error assigned the general errors. It was urged for the defendant in error, that the plea was ill, for not saying, that he was not requested before the end of the seven years, for the obligee might request

If a man binds himself to do a thing for J. S. and in an action thereon the breach is that he did not do it for the said J. S. tho' two persons of that name are before mentioned, on the pleadings the words in the breach shall refer to him for whom it was to have been done.

If a man binds himself to do a thing at a particular time if requested, he is not compellable to do it unless the request is made at the time appointed for the performance. S. C. 6 Mod. 227. 259. Salk. 585. 3 Salk. 309. Holt 68.

A request before is a nullity. S. C. 6 Mod. 227. 259. Salk. 585. 3 Salk. 309. Holt 68. him

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him before the end of the seven years, because the obligor was by the law to have a convenient time to do the thing in; and therefore unless the obligee gave the obligor notice before the day, by making his request before the end of the term, he could not be made free at the end of the seven years according to the condition. And he cited the case 1 Roll. 443. that where by the condition of a bond a thing is to be done immediately or upon request, yet the obligor shall have a convenient time to do it in. And another exception was taken, that the plea was that he was never requested to make *praediſtum Johannem in conditione praediſta ſuperius nominatum* free, and there were two Johns mentioned in the condition, the father and the ſon; and therefore this being pleaded without any addition, muſt be taken for the father, and ſo no plea, becauſe it was the ſon was to be made free. But *per curiam*, *Johannem praediſtum* muſt be intended John the ſon, that was to be made free.

To the other exception it was answered for the plaintiff in error, that it was ridiculous to ſay, a request was to be made before the time for doing the thing was come; and therefore the time for making him free by the condition of the bond being at the end of ſeven or eight years, the request ought to be then too. That the plea purſued the words of the condition of the bond, and therefore was good to a common intent; and that the plaintiff, if he had made a request before, ought to have replied that matter: which *Powys* and the chief juſtice agreed. That the ſerving ſeven years intitled the party to his freedom, and therefore the condition ſhould be underſtood according to the nature of the thing at the end of ſeven years, *i. e.* that it ſhould be done as ſoon as conveniently it could be after the end of ſeven years, for till the end of ſeven years the apprentice could not be made free. (Note, this obſervation ſeems to be ill founded, for the ſeven years begin from the date of the bond, and the indenture of apprenticeship does not appear to be of the ſame date with the bond; but by the condition the apprenticeship ſeems to be begun.)

The judgment in this caſe was reverſed. And *Holt* chief juſtice and *Powell* juſtice held, that there being a time appointed for doing the act, the request to do it muſt be at that time. And *Powell* ſaid, it was like the caſe of a demand of rent to enter for a condition broken, it muſt be ſuch a time of the day, that the party might have time afterwards to do the thing. And the chief juſtice ſaid, that the end of ſeven years was the laſt day of the ſeven years, for there is no fraction of a day; and after twelve o'clock at night is after the ſeven years, for the day is not the end of the ſeven years, but *poſt expirationem*. For the beginning and end of a thing is part of the thing.

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(a) Vide ante
480. 3 Will.
274.

A thing appointed to be done on request, ought to be done immediately on request.

thing. So if a man were born the first of *February*, and lived to the thirty-first of *January* twenty-one years after five o'clock in the morning, and then makes his will and dies by six at night, that (a) will is good, and the devisor is of age. Then the obligee must make his election the last day of the seven years, whether he will have *J. D.* made free then, or stay till the end of eight years, and make his request accordingly; for the obligee is not to make his request, but at that time when the thing is appointed to be done. He said also, that when a time is appointed, when a thing shall be done upon request, it must be done immediately upon the request, (which differs this case from those cited by the counsel for the defendant in error) as if a condition of a bond be to make a feoffment at such a time upon request, there the obligor must do it immediately upon the request. But as to this *Powell* said, that if it appeared to them, that the thing was of such a nature, as that it could not be performed at the time limited for the thing to be done upon request, there the obligor should have a convenient time after to do the thing in. Otherwise, if it can be done then, it must.

Powys and *Gould* justices held, that at the end of seven years might be understood a reasonable time after, sufficient to do the thing in.

Intr. Trin. 3
Ann. B.R. Rot.
429.

Cholmondeley *vers.* Bealing.

S. C. 6 Mod. 304. Holt 90.

Bail to an action cannot take any advantage of an irregularity in the *capias ad satisfaciendum* against the principal.
R. acc. post
1176.

A *Scire facias* against the defendant, reciting a judgment in the time of the late king against *Lilly*, and how the defendant in *Michaelmas* term the thirteenth of the late king became bail for the defendant *Lilly*; and *concessit*, that if *Lilly* was convicted in the said plea, that then debt and damages, &c. recovered should be levied of the lands, goods and chattels of the defendant *Bealing*, if the defendant *Lilly* did not pay the debt and damages, &c. or render himself to the *Marshalsea*; and that *Lilly* had not yet paid the debt and damages, &c. nor rendered himself to the prison of the *Marshalsea* of the late king or the present queen, &c. The plea in bar, that after the judgment, and before the issuing of the *scire facias*, no writ of *capias ad satisfaciendum debite prosecutum, retornatum, et affilatum fuisse de recordo* at the suit of the plaintiff against the defendant *Lilly*, &c. The plaintiff replies, a writ of *capias ad satisfaciendum* issued the twenty-ninth of *May* in the third year of the queen, to which there was a *non est inventus* returned, *prout*, &c. And to this replication the defendant demurred.

If the bail plead that no *capias ad satisfaciendum* was sued out against the principal, a replication shewing one sued out after the expiration of a year and a day from the giving of the judgment, is good, tho' it does not state either that there had been any previous writ, or that the judgment had been revived by *scire facias*.

The

The exception that serjeant *Pengelly* took was, that it appears in this case that the bail was put in of *Michaelmas* term 13 Will. 3. and that judgment was recovered against the principal in *curia domini Willielmi tertii nuper regis, &c.* but the writ of *capias ad satisfaciendum*, set forth in the plea, was not sued forth until the twenty-ninth of May 3 Ann. which is a void writ, since an execution cannot be sued forth after the year. And it does not appear here, that any writ of *scire facias* was sued out or any writ of *capias ad satisfaciendum* sued out within the year and continued on the roll, as it might be, and no such thing shall be intended; and then the *scire facias* against the bail is without warrant, and against law: for there (a) is no default in the bail, until a *capias ad satisfaciendum* be sued out against the principal, whereby the plaintiff makes election of one sort of execution, and *non est inventus* returned. So that here the plaintiff of his own shewing has no right to bring the *scire facias* against the bail, and therefore the judgment ought to be given against him. As in the common case, where by the replication it appears, that the plaintiff has no cause of action, he (b) shall never have judgment. This was taken out of Mr. serjeant *Pengelly's* paper-book.

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(a) Acc. W. Jones.
139. Lutw.
1273. 1 Will.
334. 2 Will. 65.
Doug. 58.

(b) D. Acc. arg.
ante 1080. and
see the books
there cited.
Semb. acc. 9
Co. 110. b.

Holt chief justice said, that the plaintiff had no need to set out the *scire facias* in his replication, but there might be one for all that. For it is all one to the bail, whether there was a *scire facias* or no. For they cannot have a writ of error upon the judgment against the principal, or the judgment in the *scire facias*. Besides, if there were no *scire facias*, yet the execution might be well, for there might have been a *capias ad satisfaciendum* taken out within the year, and continued down by a *vicecomes non misit breve*. As to the matter of the replication he said, that the plaintiff's writ was his title: that that only said, that the defendant had not paid the money, nor rendered his body to prison; but made no mention, whether any *capias ad satisfaciendum* was sued out by the plaintiff or no. And yet without shewing any thing of that, the writ contains a good title to the action, and a sufficient breach. Then when you come, and by your plea admit that, and only plead by way of excuse, that no *capias ad satisfaciendum* issued against the defendant, you have put the cause upon that single point; and the only matter is, whether there was any *capias ad satisfaciendum* sued out or not? And therefore then it is enough for the plaintiff to shew that there was a *capias ad satisfaciendum* sued out against the principal defendant.

In answer to this, and that the plaintiff ought to shew a sufficient writ, Mr. *Pengelly* cited the case, *Vere v. Holyoke*,
3 Keb.

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3 Keb. 671. in a *scire facias* against bail, the defendant pleaded, that no *capias ad satisfaciendum* was issued against the principal on the said judgment; the plaintiff replied, that the 23d of October a *capias ad satisfaciendum* issued and was returned; the defendant rejoined, that the judgment was had but on the 23d of November after; and on demurrer judgment was given for the defendant, and a difference taken between a judgment upon a writ of inquiry, as this was, which is at a day certain, and a general judgment; in the last case, the rejoinder had been ill, because the judgment relates to the first day of the term; otherwise in the first. He said also, that the plea was *debite prosecutum*, &c.

Holt chief justice said, that the *debite prosecutum* was nothing, that this plea was only an excuse, and that the plaintiff's writ was his title. And as to the case in *Kebble*, he said, that that writ was a void writ, and was not *super judicium prædictum*.

Powell justice said, first, that if the writ were ill taken out, it was only an erroneous execution, and the bail that are strangers cannot take advantage of that error in a collateral action. Secondly, that this *capias ad satisfaciendum* might have been well and regularly sued out, and they would intend it was so; otherwise if the *capias ad satisfaciendum* had appeared to have been sued out, out of term, that (a) had been ill. Judgment was given for the plaintiff.

(a) Vide H.
Bl. 74.

Hilary Term

3 Annæ Reginae, B. R. 1704.

Blackmore *vers.* Tidderley.Intr. Trin. 3
Ann. Rot. 231.

IN an action of trespass, assault and false imprisonment, the defendant pleaded not guilty *infra 6 annos*; and the plaintiff demurred. And Mr. serjeant Darnall for the plaintiff argued, that the court upon this plea, as it was pleaded, would not take any notice of the statute of limitations, that if this plea were a good plea, it would be a good replication for the plaintiff to say, that he took out a writ within six years, which is absurd: that no issue could be taken upon this plea, or if any issue could be taken upon it, yet if a verdict were found for the plaintiff, no judgment could be given for him, because though the defendant were guilty within six years, yet he might not be guilty within four. He said that this plea was a negative pregnant, and though, where a verdict is found upon issue joined upon such a plea, that may in some cases make the plea good; yet it is certainly naught upon demurrer. And for that he cited 12 Edw. 4. 6. *Br. Negative pregnant* 48. *Br. same title* 42.

A plea that the defendant was not guilty of a matter to which the statute of limitations extends within a longer period of time than that which the statute prescribes, is bad upon a general demurrer. S. C. Salk. 423. 6 Mod. 240. 11 Mod. 38.

Mr. Raymond for the defendant argued, that the statute of limitations is a general law, and that those pleas of the statute of limitations are never framed upon the statute, but are pleaded generally, without tying them up to, or taking any notice of the act of parliament. He said, that the plaintiff might have taken issue upon this plea, that the defendant was guilty within six years; and that the largeness of the plea taking in two years more than it needed, was for the benefit of the plaintiff: that if upon that issue the jury had found for the defendant, he must have had his judgment, because if he

Every imprisonment includes an arrest.

Therefore in an action for an arrest and imprisonment if the defendant answers the imprisonment, he need not answer the arrest

Vide ante 229. At least in an action for an assault, arrest and imprisonment, a justification of the trespass, assault and imprisonment aforesaid will include the arrest. Vide 1 Lev. 31. 2 Lev. 111, 221. The *vi et armis* in an action of trespass need not be answered.

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(a) Sed nunc
vide 4 Ann.
c. 16. f. 12.

was not guilty within six years, it was a necessary consequence, that he was not guilty within four years. And he said, he took it, that if the verdict had been found for the plaintiff, he must had his judgment too, because the plea of the defendant was falsified: like the case of debt upon a single bill, the defendant pleads payment, if upon issue joined the verdict be found for the defendant, he -(a) cannot have judgment; but otherwise if it be found for the plaintiff.

Holt chief justice. The verdict's helping of such a plea as this will not make it a good plea now upon demurrer. This must be a good plea either at common law, or upon the statute; it is not a good plea at common law, because at common law a man might bring his action at any time; neither is it a good plea upon the statute, because it does not disclose the matter, that the statute makes a bar.

Powell justice. This plea at best is but argumentative, and such pleas are never good, especially where the matter that makes the bar is made such by an act of parliament, you ought to plead it in the words of the statute. Besides, if issue had been taken upon this plea, and there had been a verdict for the plaintiff, it would have been a *jeofaile*.

Holt. How can the plaintiff reply?

(b) Vide ante
231.

(c) Vide 1 Lev.
37. 2 Lev. 111.
281.

The court held that this matter needed not be shewn for cause of demurrer, and were just going to give judgment for the plaintiff; when Mr. *Raymond* took an exception, viz. that the (b) plea was discontinued, for the declaration was of an assault, taking, arresting, and imprisoning the plaintiff; and the defendant pleaded to the trespass, assault, and imprisonment, but said nothing to the arrest. *Darnall* said, that the (c) trespass included all.

Holt said, that the imprisonment included the arrest; for imprisoning could not be without an arrest, nor an arrest without imprisonment; for an arrest is an actual imprisonment.

Judgment was given for the plaintiff.

Note, When this case was first stirred in *Michaelmas* term last, the court seemed all to be of opinion, that the plea was good, because it gave the plaintiff an advantage. The record is, action by husband and wife, for that the defendant, &c. upon the wife *apud*, &c. *insultum fecit*, and the wife, &c. *cepit, arreclavit, imprisonavit, et mactraclavit*, and the wife *in prisona ibidem per spatium*, &c. *detinuit*, &c. After imparlance the defendant pleads thus: *et idem* the defendant *defendit vim et injuriam quando*, &c.

et dicit quod actio non, quia dicit quod ipse in nullo est culpabilis de transgression, insultu, imprisonamento prædictis, ad aliquod tempus infra 6 annos proxime ante diem exhibitionis billæ of husband and wife modo et forma prout, &c. Note, Nothing was pleaded to the *vi et armis* as is usual.

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Evans *vers.* Brown.

THERE was a suit in the ecclesiastical court for these words, "You are known by the name of bawdy *Nell*, and do live with another woman's husband." Mr. *Raymond* moved for a prohibition, upon a suggestion, that the plaintiff below had brought an action at law for these words, grounded upon special damage she had sustained by the defendant's speaking of them. And he compared this to the case, where one calls a woman whore and thief, 2 *Roll.* 297. n. 25. in that case she shall not have an action in the ecclesiastical court for those words, though she might for the word whore; because it being joined with the word thief, an action lies at common law for the words. Neither (a) can the words be split, and an action brought at law for the word thief, and a suit in the ecclesiastical court for the word whore. So here, though the words are properly suable for in the ecclesiastical court, yet a special damage attending the speaking them, by which means an action lies at common law for speaking the words, they shall not proceed for the speaking in the ecclesiastical court. But the court denied to grant a prohibition.

If a man sustains any special damage by spiritual scandal, he may sue the party for them both at common law and in the ecclesiastical court.

Vide ante 309.

(a) Acc. 2 *Roll.* Abr. 295. pl. 4. ante 309. Vide 1 *Vent.* 10.

Green *vers.* Crane.

S. C. 11 *Mod.* 37. 6 *Mod.* 309. *Salk.* 28.

IN an *assumpsit* by an executor upon a promise to his testator, the defendant pleaded *non assumpsit infra 6 annos* to the testator. And upon evidence it appeared, that after the death of the testator, and after six years elapsed from the time of the contract, the defendant owned the debt to the executor, and promised to pay it. And whether this evidence would maintain the issue was the question. Serjeant *Darnall* for the plaintiff said, that it was agreed in the case of *Hyleing vers. Hastings*, ante 389. 421. that a bare owning of the debt after the six years was sufficient to revive it; but here was a promise as well as an owning. But after the case had been stirred twice, and the court had taken farther time to advise, *Holt* chief justice delivered the resolution of the court, and said, that they were all of opinion, that the action could not be maintained, the promise being made to the executor, and so out of the issue. But it would have been otherwise, if the promise had been made to the testator within six years. Note, this case was tried before *Holt* at

A promise to pay an executor cannot be given in evidence upon the issue of *assumpsit infra sex annos* to the executor's testator.

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nisi prius at Guildhall. And he permitted the parties to move it after in court.

Seers *vers.* Turner.

A habeas corpus does not remove a cause out of an inferior court.

Vide Salk 352.

21 Jac. 1. c. 13.

22 G. 1. c. 29.

§ 3.

The pendency of an action for the same cause in an inferior court cannot be pleaded in abatement to an action in a superior one.

R. acc. 12 Mod.

204.

Acc. Bro. Brief.

pl. 107. 5 Co.

62. 1.

IN an action of trespass the plaintiff declared of an assault, battery, and wounding, upon the 6th of June, and of an assault, battery, wounding, and false imprisonment by the space of four hours upon the first of August after, *ad damnum* the plaintiff 30*l.* The defendant pleads as to the trespass, assault, battery, wounding, and false imprisonment in the plaintiff's declaration secondly mentioned, Not guilty; and as to the trespass, assault, battery, and wounding in the plaintiff's declaration first mentioned, he prays judgment of the bill, because before the exhibiting of the bill, *scilicet*, such a day, the plaintiff levied a plaint in the *Marshalsea* against the defendant of a plea of trespass and assault *ad damnum* of the plaintiff 99*s.* *quæ quidem querela* afterwards, *viz.* such a day, was *debito modo* removed by writ of *habeas corpus* issuing out of the king's bench, returnable *immediate* before the chief justice, into the king's bench: and thereupon the defendant, by his attorney in the king's bench, at the suit of the plaintiff, of the plea of trespass and assault aforesaid, appeared, and put in bail, according to the custom of the said court, *prout*, &c. which plea in the king's bench *remanens adhuc pendet minime discontinuatum sive determinatum*: and avers, that the plaintiff levied, &c. in the *Marshalsea*; and the plaintiff's bill for the first mentioned trespass, assault, battery, and wounding, in the king's bench exhibited, were levied and prosecuted *pro una et eadem materia et causa actionis, et non alia neque diversa; et hoc* the defendant *paratus*, &c. *unde petit iudicium de billa prædicta* of the plaintiff against the defendant, *de una et eadem materia superius modo exhibitâ, pendente prædicto priori placito, ut præfertur, indeterminato, et quod billa illa, quoad eandem transgressionem, insultum, verberationem, et vulnerationem* first mentioned, *cessetur*, &c. To this plea the plaintiff demurred.

Mr. Ward took several exceptions to the plea, which I shall not report, because they did not receive the resolution of the court upon them, they going upon another matter, which Mr. Ward took no notice of.

Holt chief justice. A *habeas corpus* does not remove the cause out of the inferior court, the cause is stayed below; but a plaint pending in an inferior court is no plea to an action brought in the courts at *Westminster*. There is a great deal of difference between a *recordari*, or a *certiorari*, and a *habeas corpus*. In the case of a *recordari*, the proceedings are upon that; and the *recordari* is entred upon the roll,

roll, and the return of it which is the plaint, and the plaintiff declares upon that, and the parties have day in court upon the *recordari*: and so it is of a *certiorari*. But upon a *habeas corpus* the parties have no day in court, but the proceedings below are superseded, and the plaintiff has liberty to declare against the defendant, as in *custodia Mareschalli*.

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TURNER.

Powell justice. Upon a *habeas corpus* the cause is not removed out of the inferior court, so as to be pending here, and consequently it cannot be pleaded to another declaration for the same thing; but when the defendant is brought here by *habeas corpus*, we make him put in bail to answer a declaration to be delivered within two terms, and if he does not put in such bail we grant a *procedendo*; but a *recordari* is quite different, for upon that the proceedings are removed.

Holt said, that this declaration was upon the *habeas corpus*, and though an imprisonment was added, that (a) was no more than the plaintiff might do. *Powell* seemed to think it a variance, but then he said, it would be a declaration by the bye, which the plaintiff had by law liberty to charge the defendant with, and that would justify this declaration. The court gave judgment, that the defendant should answer over.

(a) Vide 1 Vent.
252. 3 Keb.
263. W. Jon.
312. Str. 719.
1 Will. 277.

This which follows is taken out of the notes of Mr. *Pengelly*, who was counsel with the defendant upon the demurrer.

By *Holt* and the court it was resolved, that the defendant should answer over. For this declaration may be in pursuance of the first *habeas corpus*, and the plaintiff may declare on an imprisonment, and when the defendant is in custody, the plaintiff may declare against him for any matter, and the variance of the damages is allowable, and is the course of the court. But indeed in that case the bail cannot be charged. A *habeas corpus* does not remove the plaint, but it is only certified, and the proceedings below are by this writ suspended, and there is no proceeding here upon that plaint. But the plaintiff declares against the defendant *de novo* as a privileged person in *custodia Mareschalli*, and there is no day given to the plaintiff upon the return of the *habeas corpus*, as in case of a *recordari* or *pone*, so that the plaintiff is not in court.

But it is a *quære*, if there be not a cause pending; for if he escapes, it seems the plaintiff may have an action against the marshal, for the defendant comes with a charge upon him, which cannot be without an action or writ.

It seems that the sheriff, marshal, &c. was answerable for the escape of a man taken by a bill of *Middisex* or *lati-*

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that before the statute that introduced the *acetiams*, and that this answers Mr. *Pengelly's quaere*.

Regina *vers.* Harman.

If a statute imposes a pecuniary penalty upon any one who shall be indicted and convicted of a matter which that statute prohibits, a person may be indicted for such matter. Vide ante 347. 991. and the books there cited.

An indictment for a matter which was not an offence at common law, but is made one by statute, ought to charge it to have been committed contra formam statuti. R. acc. Salk. 370. pl. 3. 1 Saund. 249. Vide acc. 49. Com. Indictment G. 6. 2d ed. vol. 3. p. 508. A judgment cannot be given for the crown upon an indictment which does not. 2 Cro. 643. 2 R. Rep. 247. 1 Mod. 2.

THE defendant was indicted upon the 9 & 10 Will. 3. c. 41. for preventing imbezzlement of the queen's stores, upon the clause, that such person or persons, in whose custody, possession or keeping, such goods or stores marked as aforesaid shall be found, not being employed as aforesaid; and such person or persons, who shall conceal such goods or stores, marked as aforesaid; being indicted and convicted of such concealment, or of the having such goods, or stores found in his custody, possession or keeping, shall forfeit such goods, and the sum of 200*l.* together with costs, &c. the one moiety to his majesty, and the other to the informer. And the indictment set forth, that the defendant after the 24th of June, 1698, viz. such a day, *ad-tunc vel ad aliquod tempus antea vel postea non existens pactor, Anglice a contractor, cum principalibus officiariis vel commissariis classis, Anglice navy, seu bombardarum, Anglice ordnance, ipsius dictæ dominæ reginæ, seu victualariis, Anglice victualers, pro usu dictæ dominæ reginæ, neque negotiator existens ad inde per aliquem talem pactorem, &c.* as before, *apud B. prædictum habuit in custodia, Anglice custody, possessione et custodia suis, Anglice keeping, quatuor, &c. separaliter impressat, Anglice marked, cum signo vocato the broad arrow, existentq signo cum quo res bellicosæ et navales dictæ dominæ reginæ ad-tunc et diu antea usualiter impressatæ fuere, et adhuc impressatæ sunt, Anglice marked, contra formam statuti in hujusmodi casu nuper editi, et provisi; quodque prædict. quatuor, &c. sic ut præfertur, impressat. ad-tunc et ibidem invent. fuere in custodia et possessione of the defendant, the defendant ad-tunc non existente negotiatore, ut præfertur, prout per statutum prædictum in hujusmodi casu editum et provisum requiritur, in diminutionem prædictarum rerum bellicosarum et navalium dictæ dominæ reginæ ac contra pacem dictæ dominæ reginæ, coronam, et dignitatem suas, &c.* Two exceptions were taken to this indictment in arrest of judgment: First, That no indictment lay, because it was a new offence, and a particular penalty inflicted of forfeiture of the goods and 200*l.* prout in the act. But this exception is contrary to the words of the act, and was over-ruled by the chief justice, because the forfeiture accrues by the conviction in an indictment for the offence. The second exception was, that the indictment did not conclude *contra formam statuti*.

If a statute authorizes an indictment against any one not being a contractor, upon whom stores should be found, an indictment, that the defendant not being a contractor had stores in his possession contra formam statuti, &c. and that the said stores were found upon him, he not being a contractor as by the statute is required, is bad because it does not apply the words *contra formam statuti* to the finding of the stores upon him.

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And it was said for the defendant, that where an offence is created by act of parliament, you must describe the fact so in the indictment, as it may appear to be within the statute, and you must also conclude your indictment *contra formam statuti*; for it is your concluding the indictment in that manner, that declares your proceeding for the offence to be upon the statute; and where that is wanting, the indictment is an indictment at common law, and that in this case must be ill; because a man may come to the possession of such goods by bailment, and then the having them found in one's custody is no crime at common law, but only because it is made such by act of parliament: and this is an essential form. It was insisted for the queen, that the *contra formam statuti*, and the *non existente negotiatore, prout per statutum prædictum in hujusmodi casu editum et provisum requiritur*, which concluded the two facts, that were charged in the indictment, would supply the want of the *contra formam statuti* in the conclusion of the indictment. But to this it was answered for the defendant, that in case the first fact was that which was made criminal by the act of parliament, that would have been well; which the chief justice agreed, saying that the rest would be surplusage, and would not hurt; but that it was the goods being found in the defendant's custody, which was the offence, and not the having the goods in his custody; for though he had such goods in his custody, yet if they were not found in his custody, that was no offence: and therefore it was the latter part of the indictment that contained the offence, which the chief justice agreed also; and that not being concluded *contra formam statuti* was ill.

Powell justice. In all cases of indictments for offences against a statute, the indictment must conclude *contra formam statuti*, which all the court agreed, and ordered the *posse* to stay till it was further moved.

Regina vers. Paty et alios.

S. C. Salk. 503.

PATY and four others were committed by the speaker of the house of commons, by virtue of an order of that house; and upon a *habeas corpus* to bring them before this court, the warrant was returned, which follows in *hæc verba*: *Martis 5 die Decembris 1704.* By virtue of an order of the house of commons of England in parliament assembled this day made, these are to require you forthwith upon sight hereof to receive into your custody the body of *John*

The king's bench cannot discharge a man committed upon a warrant from the speaker of the house of commons for a breach of privilege. S. C. Holt 526. R. acc. 1 Will. 299.

3 Will. 188. Bl. 754. Vide 4 Inst. 15, 17. Ante 18. 1 St. Tr. 89. 2 St. Tr. 617. 620. 3 St. Tr. 208. 7 St. Tr. 437. Junius April 22, 1771. 2 Hawk. c. 15. l. 72, 73, 74.

Tho' the party was not a member of the house.

And the breach of privilege was committed out of the house. R. acc. 3 Will. 188. Bl. 754.

And tho' the breach of privilege appears upon the warrant to have been merely bringing an action.

The speaker's warrant need not be sealed. Semb. acc. 3 Will. 188. Bl. 754.

And may direct that they shall remain in custody until they shall be discharged by due course of law. Vide ante 100, 851.

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Paty, who, as it appears to the house of commons, is guilty of commencing and prosecuting an action at common law against the late constables of *Aylesbury*, for not allowing his vote in the election of members to serve in parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this house; and him in safe custody to keep, during the pleasure of the said house of commons; for which this shall be your warrant. Given under my hand this fifth of *December anno Domini 1704*. To the keeper of her majesty's gaol of *Newgate*, or his deputy. The warrant was signed *Robert Harley*. This *habeas corpus* was moved for on the last *Monday* but one in the term, and the court granted the writ returnable the *Saturday* after. Some persons thought the return too long, and the court were much pressed to make it shorter; but the court would not, but said, that in a case of this consequence, they ought to give the parties concerned time to consider what return to make, and if there were any delay, the parties were the cause of it themselves, by not moving sooner. The defendants were brought up upon the *Saturday*, and *Mr. Mountague*, *Mr. Page*, *Mr. Lechmere*, and *Mr. Denton*, argued that they ought to be discharged. I was not present at the argument. There were no counsel to maintain the commitment. The court put off delivering their opinion till *Monday*, which was the last day of the term, and then all *seriatim* delivered their opinions. I did not hear very well, but the substance of what was said, as I apprehended, was to the following effect.

Gould justice. The prisoners ought to be remanded. He said, that this was the first *habeas corpus* that was ever brought by persons committed by the house of commons, that he ever heard or read of; and therefore no such writ having ever been brought before, that (a) is an argument, that no such writ lies. He said, if this had been a return of a commitment by an inferior court, it had been naught, because it did not set out a sufficient cause of commitment: but this return being of a commitment by the house of commons, which is superior to this court, it is not reversible for form. And that answers the objections to the form of the commitment. We cannot judge of the privileges of the house of commons, but they are to debate them among themselves. He said, it was objected, that by *Mag. Chart. c. 29*. no man ought to be taken or imprisoned but by the law of the land. But that the answer to this was, that there were several laws in this kingdom, among which was the *lex parliamenti*, which law, as it is said in the *4 Inst. 15. ab omnibus est querenda, a multis ignorata, a paucis cognita*; and that it was uncertain, that those words in the statute of *Mag. Chart.* were to be restrained to the common law. He said, the parliament had laws and customs peculiar to itself, and that this was declared to be *secundum legem parliamenti*; and that the judges ought not to give any answer to questions proposed

(a) Vide Co. Litt. 81. b. 4 Inst. 17. ante 944. The king's bench cannot judge of the privileges of the house of commons.

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proposed to them about matters of privilege, because the privileges of parliament are not to be determined by the common law. He said, there had been an objection made, that this warrant was only signed by the speaker. But he said, that was the way the house of commons acted. As to the objection, that if this proceeding here were not allowed, it would make the people of *England* bondmen; I answer, that this commitment is a punishment used by them, and that it determines with the sessions. He said, there was no difference between this and my lord *Shaftesbury's* case, 1 *Mod.* 144. That was the first instance of a *habeas corpus* granted upon a commitment by the house of lords. That according to that case, if the return had been general, without expressing what the particular matter of contempt was, it had been good; and though here the special matter was expressed, that would not alter the case, because this court had nothing to do with it, nor could gainsay the house of commons. That the house of commons were to be intrusted with the liberty of the people, and that nobody could suppose they would make any invasions upon it. The judgment in the case of Sir *John Elliot*, 7 *St. Tr.* 242. was reversed in the house of lords, because matters transacted in parliament are only cognizable there. And so it appears by *Prynne's Animad.* on 4 *Inst.* 12. He said, the house of commons were the representatives of the people, and concluded, that no *habeas corpus* would lie.

Tempore Car. 1.

Powys justice. I am of the same opinion. He said, he would consider the objections that had been made to the return and give an answer to them; not that he thought they had jurisdiction of the cause, but that the commitment might not be taken so totally naught, as it had been represented to be. He said, it had been objected, that this case differs from my lord *Shaftesbury's* case, because that was a commitment by order of the house of lords, this only by the speaker's warrant. To that he answered, that this warrant, as was recited in the warrant, was by order of the house of commons. The second objection was, that the warrant was not under seal, and 2 *Inst.* 52. is that warrants of commitment must be in writing under hand and seal. But to this I answer, that the house of commons is a court; and so my lord *Coke* says, in his 4 *Inst.* 28. 23. and commitments by a court need not be under hand and seal. And besides, the *consuetudo parliamenti* will justify this commitment. Thirdly, this case is objected to differ from my lord *Shaftesbury's* case, because (a) he was a member of the house of lords. But if this objection should take place, it would destroy all their power of committing for breach of privilege, for these are most commonly by persons not of the house. Fourthly, this commitment is for a matter done out of the house. That must receive the same answer with the last, that so are most breaches of privilege. Fifthly, it

Commitment by
a court need not
be under seal.(a) Vide ante
16.

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it is objected, that the commitment is, during the pleasure of the house of commons, whereas it ought to be, till they shall be discharged by due course of law. To this I answer, that this commitment is more favourable for the prisoner, and more for his benefit, than a commitment for a certain time; for this commitment determines with the session, and it leaves the house a power to discharge the prisoners upon their submission. Besides, this is agreeable to the constant forms of commitments by the house of commons; and it is agreeable to our commitments here, which are implied to be during the pleasure of the court. And though the house of commons express that in their commitments, yet that is only expressing what we imply. Sixthly, the cause of commitment is for bringing an action at common law, and shall the commons hinder a man from proceeding at law? Now in general speaking, that is the only use of privilege; and the meaning of privilege is, that it is a privilege against the course of law: such is the privilege of members against suits at law to be brought against them. This objection has been farther enforced by remembring the resolutions in the case of *Ashby and White*, ante 938. where it was determined by the house of lords, that an action would lie against the constables of *Aylesbury* for refusing a man his vote at an election of members to serve in parliament. But in answer to that, this does not appear to us to be the same case, The parties are different, and it may be the cases may be different, and all these prisoners may have been guilty of a breach of privilege. If all commitments for contempts, even those by this court, should come to be scanned, they would not hold water. Our warrants here in such cases are short, as for a contempt, or for a contempt in such a cause. So in chancery the commitments for contempts are for a contempt in not fully answering, &c. and would not this commitment be sufficient? If a commitment be for a contempt in not paying money according to an order of court, without reciting the order, yet such a commitment is good. The house of commons is a great court, and all things done by them are to be intended to have been *rite acta*, and the matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of court of two lines, and such commitments are held good, because it is to be intended, that we understand what we do. Seventhly, it is objected, that by *Mag. Chart. c. 29.* no man ought to be taken or imprisoned, but by the law of the land. But to this I answer, that *lex terræ* is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law, &c. and among the rest, the *lex parliamenti*. By the 28 *Ed. 3. c. 3.* there the words *lex terræ*, which are used in *Mag. Char.* are explained by the words, due process of law; and the meaning of the statute is, that all commitments must

be by a legal authority. And the law of parliament is as much a law as any; nay, if there be any superiority, this is a superior law.

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He said, there were two things, which were most materially objected. First, that this court, which is the supreme ordinary court of law, and has a very ample authority, authority to discharge a man committed *per mandatum domini regis*, has *a fortiori* authority to do it where the commitment is by subjects. But the instance put is of no weight, because such a commitment is not good. For the king is to act by his officers, and when the king sat here, it was only *pro pompa*; but (a) the judges gave the rule. As it is one of the grievances mentioned in the petition of right, 3 Car. 1. that men were detained in prison by the king's special command. A commitment by a court is of greater authority than a commitment by the king in person, and is accounted in law a commitment by the king. So where some statutes say the offenders shall be fined at the king's pleasure, that pleasure must be declared in the courts proper for the conusance of the offences. The second objection is, that if this court cannot judge of the commitments of the house of commons, and such a commitment as this is good, they may stop the whole course of law, and take upon them a despotic power. But this is a very foreign supposition, and what ought not to be said by any *Englishman*. The house of commons are a great branch of the constitution, and are chose by ourselves, and are our trustees; and it cannot be supposed, nor ought to be presumed, that they will exceed their bounds, or do any thing amiss. It does not appear to us, what these actions were; and the house of commons have examined into that; and we know, they have a jurisdiction with relation to breaches of privilege, and contempts done to them, and the right of persons to vote for members of parliament; and we must take it, that what they have done is warranted by that their jurisdiction, and is well done. He said this was a commitment in execution, and not *pro salva custodia*. He said, the court were to determine the bounds of jurisdictions, as they do the bounds of parishes, by usage; that of the side of the house of commons, there was immemorial usage: and that he expected some precedents would have brought to shew, that this court might inquire into the proceedings of the house of commons, and discharge persons committed by them; but that the counsel for the prisoners had not brought one precedent, nor one book case, nor one opinion in print, to warrant any such power in this court: and that *non-asser* in this case was a very great argument, that the court had no such power. But he said, the reason why there were no precedents of that kind was very obvious, *viz.* that it would be unreasonable to put the judges upon determining the privileges of the house of commons, of which privileges they have no account, nor any footsteps in their books:

(a) Acc. 3 Bl.
Com. 41.

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books: that the house of commons have the records of them, and as occasion requires, search them to find them: that the judges cannot resort to those records, and therefore it is indeed impossible for them to judge matters of privilege. And my lord *Coke* in his 4 *Inst. fol. 15.* says, that it is *lex ab omnibus quaerenda, a multis ignorata, a paucis cognita.* He said, my lord *Shaftesbury's* case was the only case whereever a *habeas corpus* was brought upon a commitment by either house of parliament: but that he could not say a *habeas corpus* would not lie, because, till the return of the *habeas corpus*, the cause of commitment does not appear; and it is one of the greatest privileges of the subject to have the cause of his imprisonment inquired into in this court: but when it appears to be a commitment by the house of commons, he must be remanded. The judges in my lord *Shaftesbury's* case went upon their having no jurisdiction in the cause.

Powell justice of the same opinion. He said, he had had but a short time to consider of a cause of this consequence: that it was the first cause of this nature, that had ever been before this court; for my lord *Shaftesbury's* case differed, because he was a member of the house of peers, and they might have other powers over their own members, than they had over their fellow-subjects without doors. He said, the court could not judge of the return: First, because they were committed by another law, and consequently we cannot discharge them by that law, by which they were not committed. There is a *lex parliamenti*, for the common law is not the only law in this kingdom; and the house of commons do not commit men by the common law, but by the law of parliament. Consider the judicature of parliament. The house of lords have a power of judicature by the common law upon writs of error, but (a) they cannot proceed originally in any cause. But they proceed too in another manner in case of their own privileges, and therein the judges do not assist, as they do upon writs of error; and their proceeding in that case is by the *lex parliamenti*. So the commons have also a power of judicature, and so is 4 *Inst. 23.* but that is not by the common law, but by the law of parliament, to determine their own privileges; and it is by this law that these persons are committed. He said, this court might judge of privilege, but not contrary to the judgment of the house of commons, which yet we must do in this case, if we discharge the prisoners from their imprisonment, which is the only judgment the house of commons can give, upon their determination, that these persons have been guilty of a breach of their privileges. This is drawing the plea *ad aliud examen*, and yet the house of commons are the supreme judges of their own privileges. This court judges of privileges only incidentally, and so they did in *Binyon's* case, *cit. Carth. 137. 1 Show. 199.* and in the case of *Albby vrsf. White*, ante 938; for when an action is brought in this court, judge-

(a) D. acc. ante
25.

judgment must be given one way or other. So they do in ecclesiastical matters, when a question of that nature arises in an action brought before them; as in the case of the quaker's marriage depending in the common pleas; but their judgment will not bind the ecclesiastical court. And therefore, if such a marriage should be adjudged at law to be a good marriage, and yet afterwards the parties should be cited into the ecclesiastical court for living in fornication, and excommunicated, and taken upon the *capias excommunicatum*, this court could not discharge them upon a *habeas corpus*. So here, the court of parliament he said was a superior court to this court, and though the king's bench have a power to prevent excesses of jurisdiction in courts, yet they cannot prevent such excesses in parliament, because that is a superior court to them, and a prohibition was never moved for to the parliament. If the house of lords should take upon them to determine freeholds, this court could not prohibit them, there are writs in the *Register ad regia jura conservanda*, which may be sent to the ecclesiastical court, but they cannot go to the house of lords. There was a case lately, wherein the lords made an order originally in a cause, but the parties grieved could not have come here for relief. So *Skinner's* case was brought originally in the house of lords, and this court could not have helped them. He cited 4 *Inst.* 50, 51, and 13 *Co.* 63, 64. that the privilege, order, or custom of parliament, either of the upper house, or house of commons, belongs to the determination or decision only of the court of parliament; the judges being asked by the lords concerning privilege of parliament, answered, that they ought not to answer to this question, for it hath not been used aforetime, that the judges should in any wise determine the privilege of this high court of parliament; for it is so high and mighty in its nature, that it may make laws, and that what is law, it may make no law, and the determination and knowledge of that privilege belongeth to the lords of parliament, and not to the judges. The privilege in question in that case was concerning the speaker of the house of commons being taken in execution. But if they should discharge these persons, that are committed by the house of commons for a breach of privilege, this would be to take upon themselves directly to judge of the privileges of parliament. This want of jurisdiction in the court cures all the faults in the commitment; though if that were to be debated, there ought to be a difference taken between a commitment for a crime, and for a contempt. And as to that objection to the warrant, that it was to detain the prisoners during the pleasure of the house of commons, that he said was the constant form of warrants by the house. It is objected, that in bringing these actions the prisoners have done nothing but what the lords have adjudged they may do, and the house of lords is the supreme judicature of the kingdom. As to that, he said, that if this commitment

The common pleas determining a quaker's marriage good, does not bind the ecclesiastical court; and therefore, if they excommunicate them, this court cannot discharge them upon *habeas corpus*.

31 Hen. 6. a.
25, &c.
See *Prynne's* 4
Inst. 16.

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were for that reason an excess of jurisdiction, that court could not remedy it, but it ought to be remedied by conference, and that was the proper remedy, where the parliament assumes an excessive jurisdiction: that where the lords in *Skinner's* case assumed an original jurisdiction, upon a conference the lords were satisfied and receded. Upon conferences the reasons upon which the houses act will appear, and if the commons have no reason for what they do, it is to be presumed they will never be chosen again; and if the lords are in the wrong, the other house will not rest till all is set right again. In my lord *Shaftesbury's* case the judges were all of opinion, that the cause of commitment was not examinable here, which is an authority in point that we have nothing to do with this case. As to the prisoners not being members, there are many instances that the commons can commit persons not members of the house; and there are many instances of such commitments in 4 *Inst.* 23. So in *Ferrer's* case in *Dier* 61, the sheriff was committed for detaining a member of parliament in execution. And though, as *Moore* 57. is, a man in execution cannot have privilege of parliament, and so the execution was good, yet it was irregularly executed. But besides, the house of commons having a power to examine matters of privilege, must also of consequence have a power to punish the breach of it. As for my lord *Danby's* case, he was under a criminal prosecution by way of impeachment, and upon that was committed, and lay four months in gaol, and for that reason was bailed; and the house was not then sitting. He said, the house of commons had the power to determine election, and that any voices given, or an election before the precept read and published, are void, as my lord *Coke* says, 4 *Inst.* 49. *secundum legem et consuetudinem parliamenti*. There have been many statutes made relating to these matters, and so far they are subject to the common law, but no farther.

Holt chief justice said, that the legality of the commitment depended upon the vote recited in the warrant; and for his part he thought the prisoners ought to be discharged, though in this his opinion he was so unfortunate as to go contrary to the act of the house of commons, and the opinion of all the rest of the judges of *England*, whose assistance they had desired, and there had been a meeting for that purpose. He said, that this was not such an imprisonment as the freemen of *England* ought to be bound by; for that this, which was only doing a legal act, could not be made illegal by the vote of the house of commons; for that neither house of parliament, nor both houses jointly, could dispose of the liberty or property of the subject; for to this purpose the queen must join: and that it was in the necessity of their several concurrences to such acts, that the great security of the liberty of the subject consisted. He said, that the first matter, which was laid as a breach of privilege, was none: and to that purpose he cited *Binyon's* case, where in

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an *assumpsit* the defendant pleaded the statute of limitations, and the plaintiff replied, that the defendant was a parliament man, &c. and the plea was over-ruled, because one (a) might file an original against a parliament-man, and continue it down, without breach of privilege. And that it should be so is of absolute necessity, in order to save the statute of limitations; for otherwise, as is held in that case in 1 *Lev.* 111, that case not being provided for by an exception, the plaintiff would be barred of his action, notwithstanding that he could not file an original. So a man whilst member of parliament may alien his estate by fine with proclamations, and a person that has right may be necessitated to commence an action to save the bar that would incur against him by the statute of 4 *Hen.* 7. So one may commence an action against a member of parliament, that is executor; and consequently the commencing an action against the constables of *Aylebury* is no breach of privilege. As to prosecuting the action, which was the second matter; he said, it was uncertain what sort of prosecuting they meant. For prosecuting might be only continuing the original, which as was said before, would be no breach of privilege, though taking out a *capias*, or a *distringas* would. The third thing is, the persons the action is brought against, viz. the constables of *Aylebury*; now it does not appear, that the constables of *Aylebury* have any privilege, and if they have any, it ought to have been set out, because *qua* constables of *Aylebury*, they have no more privilege than the constables of *St. Martin's in the Fields*. The fourth matter, he said, was for bringing an action at common law for not allowing his vote in the election of members to serve (b) in parliament. Now to bring an action against a person, who is not privileged, he said was no offence, though no action would lie in this case, or though the matter upon which the action was grounded was false. And so is 2 *R.* 3. p. 9. And if a peer be charged with any false and scandalous matter, yet if it be by way of action, he (c) cannot have *scandalum magnatum*. A man who brings an action against another, who is not a privileged person, is not to have his action stopped, especially if he has a good cause of action, which that the plaintiffs in this case have, appears by the reversal of the judgment of this court in *domo procerum* in the case of *Ashby vers. White*. And this action, which was brought in this case, appears by the description of it in the vote of the house of commons, to be for the same cause of action that that was. I will suppose, that the bringing such actions was declared by the house of commons to be a breach of their privilege; but that declaration will not make that a breach of privilege that was not so before. But if they have any such privilege, they ought to shew precedents of it. The privileges of the house of commons are well known, and are founded upon the law of the land, and are nothing but the law. As we

(a) Vide ante 18.
and the books.
there cited.

2d matter.

3d matter.

4th matter.

(c) *R. acc. Keil.*
26. a *Dyer.* 235.
a.

(b) He said, when multiplicity of suits arose, costs were given to deter men from vexatious suits. *Str.* 23 H. 3. c. 15. Note to the 3d Edition.

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all know they have no privilege in cases of breaches (a) of the peace. And if they declare themselves to have privileges, which they have no legal claim to, the people of *England* will not be estopped by that declaration. This privilege of theirs concerns the liberty of the people in a high degree, by subjecting them to imprisonment for the infringement of them, which is what the people cannot be subjected to without an act of parliament. As to what was said, that the house of commons are judges of their own privileges, he said, they were so, when it comes before them. And as to the instances cited, where the judges have been cautious in giving any answer in parliament in matters of privilege of parliament; he said, the reason of that was, because the members know probably their own privileges better than the judges. But when a matter of privilege comes in question in *Westminster-hall*, the judges must determine it, as they did in *Binyon's* case. Suppose these actions against the constables of *Aylesbury* had gone on, and the defendants had pleaded this privilege; we must have determined, whether there were any such privilege or no. (b) And we may as well determine it upon the return of this *habeas corpus*, for the defendants are here in a proper course of law, and the matter appears to us upon record as well this way, as if it were pleaded to an action. We must take notice of the *lex parliamenti*: my lord *Coke*, in his 1 *Inst.* 11. b. enumerates the several laws that are within this realm, and the *lex parliamenti* is one of them, and the *lex parliamenti* is the law of the land. As to what my lord *Coke* says in the same place, that the *lex parliamenti est a multis ignorata*, that is, because they will not apply themselves to understand it. He gave a great *encomium* of my lord *Clarendon*, and cited a passage out of his history, relating to the same doctrine with this, that was then set up, that the house of commons were the only judges of their own privileges, and therefore whatever they said was their privilege, was such: it is in his first part, fol. 310, &c. and is very applicable to the present case, but too long to be transcribed. He said, he would cite a greater author than he, king *Charles* the First, in his answer to the declaration and votes of the two houses concerning *Hull*, *Clarendon*, 1 part, 400, and *Rushworth's Collections* vol. 3. p. 728, 730, 731, wherein, among other things he says, he very well knew the great and unlimited power of a parliament, but he knew as well, it was only in that sense, as he was a part of that parliament; without him and against his consent the votes of either or both houses together must not, could not, should not, (if he could help it, for his subject's sake as well as his own) forbid any thing that was enjoined by the law, or enjoin any thing

(a) He said, the *lex terræ* is the genus, and comprehends all the law of the land; the admiralty law and others are species of this grand law; so is the *lex parliamenti*; and if it be, the judges either do or ought to know what it is. Note to the 3d edition.

(b) He said, as to the high contempt of the jurisdiction of the house of commons, neither house can hold plain any action, not the house of lords originally, therefore how can they have any jurisdiction in this case? From Banbury's MS. Note to the 3d Edition.

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that was forbidden by the law. (a) And the chief justice said, if the votes of both houses could not make a law, by parity of reason they could not declare law. That the bringing this action is no breach of the privilege of the house of commons, appears by the judgment in the case of *Ashby and White*, in the argument of which case before the house of lords, this argument of the privilege of the house of commons was insisted on. Besides if the bringing this action was a breach of the privilege of the house of commons, why was not *Ashby* committed, when he first brought the action; but the suffering him to go on with his action is an argument, that this pretence of privilege is a new thing. *Ashby* recovered in his action, and these men have followed his steps, and yet they are here said to have acted in breach of the privilege of the house of commons. I shall say nothing to the case of *Ashby and White*, because the reasons upon which that judgment was given are printed. He said, the bringing this action is said to be in high contempt of the jurisdiction of the house of commons; but that he said could not be, because neither house of parliament could hold plea in any action; and besides, the defendants might wave their privilege. He said, he made no question of the power of the house of commons to commit; they might commit any man for offering an affront to a member, or for a breach of privilege; nay they might commit for a crime, because they might impeach. He said my lord *Shaftesbury's* case differed from this, because the commitment there was for a contempt done in the house. He said, the cause of the prisoner's commitment being expressed in the warrant, excluded any intendment, that they might be committed for any other cause, than that expressed in the warrant. He said, both houses of parliament were bound by the law of the land, and in their actions were obliged to pursue it. He cited my lord *Banbury's* case, ante 10, which was thus: My lord *Banbury* was indicted of murder by the name of *Charles Knollys*, Esq; and he pleaded in abatement, that by letters patent king *Charles I.* created his grandfather earl of *Banbury*, and so shewed the descent to him, and prayed judgment of the indictment, because he was not named earl: the attorney general replied, that upon his petition to the house of lords to be tried by his peers, the lords dismissed his petition, and disallowed his peerage, &c. And upon demurrer the replication was held to be naught, and the plea good, and the indictment was abated; and said,

(a) He said, a house of commons can no more declare any thing to be law by their resolutions, than they can make a law by themselves, and who (says he) can shew me how an house of commons can stop a lawful prosecution? No man has privilege against the law of the land. And nothing but an act of parliament can subject any man's person to imprisonment. It is true the judges do not interpose in the house of lords in matters of privilege, because the lords are well acquainted with that themselves; but when a question regularly arises in the queen's bench concerning privilege, there the judges must concern themselves. Suppose the action had gone on without the interposition of the house of commons, and the defendant had pleaded privilege to the jurisdiction of the court, and to this it had been demurred, must not the judges then have determined privilege? From *Banbury's* MS. Note to the 3d Edition.

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the habeas cor-
pus.

that case would go a great way in this case. See *Latch* 48, 150. *Hodges v. Moor*, *Stiles* 415. Captain *Streeter's* case, and *Stiles* 90.

After this resolution of the court given, the court were moved, that a record might be made up of the case: and upon attendance of the judges in vacation, a form of entry was settled and agreed on; which begun with the award of the writ, returnable as aforesaid, and then that upon the day the keeper of *Newgate* brought up the prisoners and made the return aforesaid, and then a *curia advisare* till *Monday*, and then the bringing them up again, and then the following entry; *et super matura deliberatione per curiam hic habita, pro eo quod videtur curiae hic, quod cognitio causae captionis et detentionis praedicti Johannis Paty non pertinet ad curiam dictae dominae reginae coram ipsa regina, ideo idem Johannes remittitur praefato custodi goalae dictae dominae reginae de Newgate, remanere in statu quo fuit tempore emanationis brevis praedicti.*

Regina vers. Callingwood.

Regina vers. Daniel.

An indictment will not lie against a man for enticing away an apprentice. *S. C.* *Salk.* 380. 3 *Salk.* 191. 6 *Mod.* 182. *Holt* 346. with some difference 6 *Mod.* 99. cit. 6 *Mod.* 289.

An indictment for enticing a servant or apprentice to take goods from the house and shop or his master must shew where such house and shop were, *S. C.* *Salk.* 380. 6 *Mod.* 182, 289.

INDICTMENT, that the defendant 20 Martii, &c. et diversis diebus antea tam nocte quam in die apud, &c. quendam Carolum Scrivener servum et apprenticum cujusdam Ricardi Croft illicite injuste et nequiter movit seduxit et allexit 600 yards of calamanca valoris, &c. de bonis et catallis praefati Ricardi extra praedictam domum et shopam ipsius Ricardi illicite injuste et nequiter capere et asportare, et quod eodem die et diversis diebus, &c. the defendant bona et catalla praedicta a praefato Caroli Scrivener servo et apprenticio praefati Ricardi Croft adtunc apud, &c. illicite injuste et nequiter cepit recepit habuit, et ad usum suum proprium convertit, bene sciens praedictum Carolum Scrivener fore servum et apprenticum praefati Ricardi Croft, ad grave damnum ipsius Ricardi, et in malum exemplum omnium aliorum, &c. Judgment was given for the defendant in this case, upon the authority of the case of *The Queen v. Daniell*, *Salk.* 380. 3 *Salk.* 191. 6 *Mod.* 99, 182. *Holt* 346. which indictment was, quod tali die et diversis diebus, &c. quendam Carolum Scott servum et apprenticum cujusdam Josephi Bishop extra domum shopam et servitium praedicti Josephi magistri sui docedere et seipsum absentare illicite et injuste allexit procuravit et causavit, et quod praedictus Johannes Daniell adtunc et diversis diebus, &c. antea, illicite injuste et nequiter movit seduxit et allexit praedictum Carolum Scott 200 Carolina hats valoris, &c. de bonis et catallis praefati Josephi extra domum et shopam ipsius Josephi illicite injuste et nequiter capiendum et asportandum; et quod Johannes Daniell eodem die et diversis diebus, &c. praedicta bona et catalla praefati Josephi adtunc et ibidem illicite injuste et nequiter cepit recepit habuit, et ad usum ipsius Johannis proprium convertit, ipse idem Johannes dictis diebus, &c. bene sciens praedictum Carolum Scott

Scott fore servum et apprenticium ipsius Josephi, &c. In this case of *The Queen v. Daniell*, after several motions, and debate of the matters moved in arrest of judgment, judgment was given for the defendant. *Holt* chief justice gave the reason of their judgment, for the indictment was naught. For he said, this was a private injury, for which an action upon the case would lie, but it was not an injury of such a publick nature, as to maintain an indictment. Indeed an (a) action of trespass will lie for taking a man's servant out of his actual service. So is 21 *Hen.* 6. 31. but for enticing away a man's servant, which is the case here, trespass will not lie, but only an (b) action upon the case. Secondly, he said, it did not appear whether this *Charles Scott* was a servant or an apprentice, for the indictment is *servum sive apprenticium*. Now a servant and an apprentice are distinct things; an (c) apprentice must be by deed, a servant may be by *parol*, and the discharge of an apprentice must be by deed, of a servant by *parol*: so is the book before cited. But however, it is but a private injury, and actionable, were this *Scott* servant or apprentice. He said, there was another matter laid in the indictment, besides enticing away the servant; but he said there was no *venue* laid for it, and so that would not help.

They were taken. S. C. 3 *Salk.* 42. 6 *Mod.* 288. A charge that the defendant incited him, and unlawfully received the goods of him, is not tantamount. S. C. 3 *Salk.* 42. 6 *Mod.* 288.

Note, It is there said, that if in trespass quare, &c. the writ be *servum for apprenticium* or *vice versa*, it may be pleaded in abatement of the writ.

Gould justice said, in *Noy* 105. there was an action upon the case for enticing away an apprentice.

Powell justice said, he doubted at first. But besides he said, it ought to have been laid in the indictment, that *Scott* did depart.

In the case of *The Queen v. Callingwood*, after verdict for the queen, it was moved in arrest of judgment, that there was no place laid where the *domus et shopa* were, it was said, *domus et shopa, praedit.* and there was no *domus et shopa* mentioned before. And it was urged, that this was the same exception that was allowed by the court in the case of *The Queen v. Daniell*. The court agreed, that the indictment in the case of *Daniell* was held to be ill, because there was no *venue* where the goods were taken away, and so all that part of the indictment being discharged, the question came to be upon what remained, whether the bare enticing an apprentice away from his master were a sufficient matter to maintain an indictment, which was resolved that it was not.

Mr. *Mountague* took an exception, that it was not averred, that the apprentice took away the *calamanco*, and it is not enough to say, that the defendant received it, without saying, that the other took it away.

(a) 1 *R. act. Cowp.* 54. (b) *D. acc. Cowp.* 55. (c) *Vide* 3 *Ellis* c. 4. f. 25.

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Otherwise in case of a verdict for the crown, the court will be obliged to arrest the judgment. S. C. *Salk.* 380. 6 *Mod.* 288. The words "dictæ domine" in this sentence, "ad sessionem pacis domine reginæ coram iusticiariis dictæ domine, &c." shall refer to the queen.

An indictment against a man for inciting a servant or apprentice to take away his master's goods must shew explicitly that

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Holt chief justice said, that it should have been laid, that the defendant seduced the apprentice, and that the apprentice *vi et armis* took away the goods. The indictment might have been general against the defendant for taking away the *calamanca vi et armis*, for he is a taker.

Judgment was given for the defendant upon the first exception, because it was the same case with that of *Daniell*.

There was an exception taken to the caption, that it was *ad sessionem pacis dominæ reginæ, &c. coram, &c. justiciariis dictas dominæ ad pacem, &c.* omitting *reginæ*; but that was held to be well, and that *dictas dominæ* should relate to *reginæ* before.

Lyfney vers. Selby.

Declaration, post Vol. 3. p. 31.

An action will lie against the seller of any interest in an estate for affirming the rents to be more than they are while he is in treaty about the sale, if the party to whom the affirmation is made relies upon it, and buys the interest thereon. Vide 3 T. R. 51. ante 593 and the books there cited.

Tho' the seller was not then in possession of the estate.

And the affirmation preceded the sale.

AN action upon the case *pro eo quod cum quaedam conservatio habita et mota fuit inter* the defendant and plaintiff, *de et concernens perquisitionem 14 messuagiorum cum pertinentiis* of the defendant's by the plaintiff of the defendant to which or to the equity of redemption *eorundem* the defendant had *titulum et remanere cujusdam termini 61 annorum* commencing in *crastino Lady-day* 1683 then to come and unexpired; and upon that communication the defendant affirmed falsely and fraudulently to the plaintiff, that the aforesaid 14 houses *cum pertinentiis* were then demised at the yearly rent of 68 *l.* to which assertion and affirmation of the defendant's then and there so made the plaintiff giving credit, the same plaintiff afterwards, *viz.* the same day and year and place bought of the aforesaid defendant the said 14 messuages *cum pertinentiis* for a great sum of money, *viz.* for 5 *l.* in hand paid, and for 200 *l.* then before owing to the plaintiff by the defendant for money lent by the plaintiff to the defendant, and thereupon the defendant by an indenture of assignment between the said plaintiff and defendant bargained and sold and assigned to the plaintiff the said 14 messuages *cum pertinentiis*, and the equity of redemption of the same, to hold to the plaintiff for the residue of the said term of 61 years then to come and unexpired, *ubi revera et in facto* the said 14 houses at the time of the affirmation of the defendant aforesaid, and at the said time of the buying and assignment aforesaid, were demised for 52 *l.* 10 *s.* only and no more; *et sic idem* the plaintiff says, that the defendant then and there falsely and fraudulently deceived and defrauded the plaintiff to the damage of the plaintiff of 200 *l.* Upon not guilty pleaded, there was a verdict for the plaintiff. Mr. Byr moved in arrest of judgment; first, that it did not appear that the defendant was in possession of these houses at the time of the sale, though it was necessary he should be so, to the maintaining of the action, the reason and ground

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ground of the action being that the defendant had a better means of knowing the yearly rent than the plaintiff. It is only laid in the declaration, that the defendant was intitled to the houses, or the equity of redemption *corundem*, which makes it more probable he was out of possession, and consequently having no better means of knowledge than the plaintiff, though he did affirm the houses to be demised at such a yearly rent, yet that affirmation will not be sufficient to ground an action upon. Secondly, it does not appear that this affirmation was made at the time of the sale, the declaration says, that such a day there was a communication, &c. and upon that this affirmation was made by the defendant, to which affirmation the plaintiff giving credit, afterwards he bought. To warrant this exception he relied on the case in 2 Cr. 196. *Roswell vers. Vaughan*, where in case in nature of deceit, the plaintiff declared, that queen *Elizabeth* was seised in fee of the advowson of the vicarage of *S.* to which the tithes in *S.* appertained: to which vicarage the 9th of June 35th of *Elizabeth* the defendant affirmed, that he was lawful incumbent, and had right to the tithes from the death of *T. V.* the last incumbent: whereupon the plaintiff 16 June 35 *Eliz.* having communication with the defendant about his buying of the defendant the tithes appertaining to the said vicarage from the death of *T. V.* the incumbent, which was 16 April 35 *Eliz.* until *Michaelmas* following, the defendant *ad tunc sciens*, that he had not any right or interest to the tithes, whereas he was never instituted and inducted, but that they appertained to *E. T.* sold them to the plaintiff for 30*l.* *falsè et deceptivè*, and avers, that *E. T.* was presented, admitted, &c. to that vicarage the last day of August 35 *Eliz.* and took the tithes, and so the plaintiff lost them: in which case it is held, that the warranty, which is necessary in these actions, ought to be at the time of the sale. And by the same reason the affirmation, which in these actions comes in lieu of the warranty in those, ought to be also at the time of the sale. It appears upon the declaration in this case, that the affirmation and the sale were the same day; but it is *posse* that same day; so that the affirmation was not at the very time of the bargain. The chief justice said, the reason of the case in *Croke* was, because the thing that was sold being in the realty, the plaintiff who was buyer might have looked into the title. Which *Powell* agreed, and said it was like selling another's lands, for which the buyer shall never have any action.

Case does not lie
for selling the
lands of another
man as his own.

- Serjeant *Darnall*. The first objection, that it does not appear, that he was in possession, is nothing; for it is not material whether he were or no. We have shewed, that the defendant was intitled to 14 messuages, and being so intitled, treated with us for the sale, and we not knowing
the

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the value of them, nor what they were let for, the defendant affirmed they were let for so much; and that we giving credit to his affirmation bought them; whereas at the time of the affirmation, and at the time of the sale, they were let only for so much. So that our action is grounded on the sale, and therefore, unless the defendant has not power to sell them, nothing else is material. The rents the houses were let for was in his notice, not in ours.

Holt chief justice said, as to the *warrantizando vendidit*, that will be so, though the warranty be before the sale; as if upon a treaty about the buying of certain goods, the buyer should ask the seller, if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand the price, and the seller should set the price, and then the buyer should take time to consider for two or three days, and then should come and give the seller his price; though the warranty here was before the sale, yet this will be well, because the warranty is the ground of the treaty, and this is *warrantizando vendidit*. But it is otherwise, if the warranty be after the sale; as if a man sells goods, and afterwards warrants them, such (a) a warranty is not good. But in the other case the warranty is part of the contract. Secondly, as to the defendant's not being in possession; suppose a man has houses in lease in the possession of his tenants, which is this case, and upon sale of them affirms, that they are let at so much *per annum* rent. The case of *Eaking v. Tresham* 1 Keb. 510. 518. 522. 1 Lev. 102. 1 Sid. 146. is, that an action will lie for such a false affirmation. If it were not for that resolution, I should think it a hard action to maintain. The difference is there taken between the annual value and the value in gross: if the vendee does not depend upon the affirmation of the vendor, but sends to inquire into the value of the houses, &c. what they let for, as it appeared the plaintiff did in this case, there it is not reasonable he should recover. And therefore this was not a good verdict, but I believe the jury had compassion upon the defendant upon this consideration, because it was not so clear, that the plaintiff relied upon his affirmation, and therefore gave such small damages as 20l. If the vendor gives in a particular of the rents, and the vendee says, he will trust him and enquire no farther, but rely upon his particular; there if the particular be false, an action will lie: but if the vendee will go and enquire farther what the rents are, there it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular.

Powell justice. The plaintiff did not make out his title to his action so clearly upon the trial. Where the action is grounded upon the warranty, there you must say in your declaration, that the defendant *warrantizando vendidit*; but in

(a) R. cont.
Dougk. 18.

in these actions upon the case in nature of deceit for a false affirmation, you need not lay, that the defendant *affirmando vendidit*. And if in those actions founded upon a warranty, the warranty were given before the sale, or whilst the contract was depending, the evidence will support well enough the *warrantizando vendidit* in the declaration. This declaration would not have been good upon a warranty, because the warranty must be before the sale. But there are actions upon the case in nature of deceit, which will lie upon a false affirmation, without a warranty; but the matter that sticks with me is, that the vendee might have inquired into the rents. But then to that it may be answered, that the tenants might have combined with the landlord, under whose power they frequently are, and have mis-informed and so cheated him. The case of *Eakins and Tresham* is this very case in point, and the difference is there taken between the value of land or a lease in gross, and the value of the rent, or what it is let at; an action will not lie for a false affirmation in the first case, without a warranty according to the case is *Yelv. 20.* otherwise in the second. As to the defendant's not being in possession, he said that was all one, for the equity of redemption was saleable: and if upon such a sale such an affirmation be made, that is a sufficient cause of action. He said the *posse* here is not after the contract, but after the communication. *Quære.*

Gould justice said, the value of the rents was a thing hard to be known, and secret, known to none but the landlord and the tenants, and they might be in confederacy together.

Powys justice said, that it was a hard action, because the vendee might come to the knowledge of the value of the rents. And he took notice of the difference in *Eakins* and *Tresham's* case.

This past in *Michaelmas* term last, and the court took time to consider and look into the record of *Eakins* and *Tresham's* case; and after long considering, and upon the view of that record, the last day of *Hilary* term the chief justice returned the *posse* to serjeant *Darnall* and bid him enter his judgment.

Markett *vers.* Johnson.

S. C. Salk 180.

IN an action of debt upon a bond of 500*l.* the defendant pleaded, *quod 225*l.* parcellam de praedictis 500*l.** that he had paid it, and the plaintiff demurred. And it was moved on the part of the defendant, that by the demurrer the action was discontinued, the plea being only to *dicir*, as to the residue, otherwise the whole suit will be discontinued, S. C. 11 Mod. 34. R. acc. ante 716. Acc. Gilb. C. B. 62. 155. 160. Vide ante 231. Cart. 51. but tho' he answers such plea immediately, he has the whole of the term in which it was pleaded to take such judgment. R. acc. ante 716.

If the defendant pleads as to part only of the plaintiff's demand, the plaintiff must take judgment by nil

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A plea may be entered on the record as of a subsequent term to that in which it was delivered. Vide Doug. 102.

part; and therefore the plaintiff ought to have taken judgment by *nil dicit* for the residue. And the case of *— vers. Mason* was cited, in which serjeant *Hall* was of the plaintiff's counsel, where in an action of debt upon a bond, the defendant pleaded *quoad* part, payment and an acquittance, and the plaintiff demurred, and the action was held to be discontinued. Serjeant *Hall* for the plaintiff said, that it was not a discontinuance in this case, because the bond is intire, and therefore the plaintiff cannot have judgment for part.

Holt chief justice said, that in an action of debt upon a bond, a man might have several pleas in bar. As suppose the plaintiff sued as executor, the defendant might plead the release of the testator as to part, and for the residue the release of the plaintiff. So a man may plead *quoad* part, payment and an acquittance, and then there being no answer to the residue, the plaintiff should have took judgment by *nil dicit* for it.

The court were going to give judgment for the defendant, when it was observed, that this plea was of this term, and therefore the plaintiff might take his judgment for the residue by *nil dicit*, and for the residue, for the insufficiency of the plea.

It was alleged for the defendant, that the plea delivered was of last term, and therefore the record ought to have been made up so. And it was prayed, that it might be examined. But the clerks certifying the court, that it being only a plea to enter, the record might be made up either way; the court would not order it to be examined, but said it was trick for trick.

Tyson *vers.* Hylyard.

S. C. with some difference, Salk. 269. Holt 276.

UPON a writ of error of a judgment in the common pleas, the declaration was of *Trinity primo*; and upon diminution alleged for want of an original, and imparlance, and continuances, and *certiorari* sued out, it was returned, that the declaration was of Hil. 13 Will. 3. with imparlances to *Trinity primo*, and an original of *Trinity primo*. And it was objected, that this could not be the original in this action, being after the declaration; and so there being no original, the judgment ought to be reversed.

The *placita* was of *Trinity primo*. Debt upon a bond of 100 l. by the plaintiff, as the record is, administrator of *Christopher Hylyard de bonis non administratis per Jane Hylyard*

If a *certiorari* issues in error to ascertain whether there was any entry of the declaration in the cause, and a return is made stating the entry of a declaration in a different term from that in which the declaration in the cause in error appears upon the transcript to have been exhibited, the declaration mentioned in such return shall be taken to be a declaration in a different cause from that on which the writ of error is brought. Vide 1 Roll. Abr. 764.

widow,

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widow, executrix of *Christopher*, with the will of *Christopher* annexed. The defendant in *propria persona sua venit et defendit*, &c. et nihil, &c. dicit, and thereupon judgment is given for the plaintiff in the same term. The plaintiff in error assigns for error, *inter alia*, that there was no original of Hil. 1701, or Easter 1702, or Trin. primo, nec non quod habetur omissio certificationis intrationis narrationis, et continuationum processus superinde facti, de termino sancti Hilarii 1701 supradicti; and also, that there was not any warrant of attorney for the plaintiff in the common pleas, and thereupon prays *certiorari*. The *custos brevium* returns, that there is no original of Trinity primo, and thereupon a *scire facias* is awarded against the defendant in error; and he comes in and pleads, that there is an original of Trinity primo, which is omitted in the record certified, and prays a *certiorari* to the *custos brevium*, who returns an original of Trinity primo. Thereupon the plaintiff in error prays a *certiorari* to the chief justice, to certify, whether there was any warrant of attorney for Hylyard *necne*, and also *utrum sit aliqua intratio narrationis et continuationum processus super inde facti in placito prædicto de termino sancti Hilarii, 1701, seu de termino Paschæ, 1702, sive de termino sancti Trinitatis primo, necne*. The chief justice returns, *quod invenit intrationem de recordo narrationis, ac licentiam interloquendi ad narrationem illam cum continuationibus inde inter partes prædictas, tenor cujus, &c. Placita irrotulata, &c. coram the chief justice, &c. de banco, de termino sancti Hilarii, anno regni Willielmi tertii, &c. 130*. And then follows the declaration, word for word the same with this; and then follow the imparlances, *viz. et prædictus Willielmus Tyson in propria persona sua venit et defendit vim, &c. et petit licentiam inde interloquendi hic usque in quindenam Paschæ et habet, &c. Idem dies, &c. ad quem diem, &c. et super hoc idem Willielmus petit ulterius licentiam interloquendi hic usque a die sanctæ Trinitatis in tres septimanas, et habet, &c. idem dies, &c.* And the chief justice also returns, that there was no warrant of attorney of any of those terms or years. The defendant in error pleads, that there is a warrant of attorney of Trinity primo, and prays a *certiorari*; and the chief justice returns a warrant of attorney of Trinity primo; and thereupon the defendant in error pleads, *in nullo est erratum*.

Powell justice. The way in the common pleas is to enter all their proceedings of the same term of which the judgment is given.

Holt chief justice. This matter that is returned is impossible and repugnant, and cannot be in this action. It is contrary to the record, to certify imparlances in a cause, as which there is no such cause. There is no reason in this case for an imparlance, for imparlances are not to be given by the court, unless they are asked for, contrary to 1 *Keb.*

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238. n. 37. cited by Mr. Parker for the plaintiff in error, who holds, that in judgments by *nil dicit*, or *non sum informatus*, the defendant must have time to plead, and they cannot be entered the same term. This declaration must be took to be in another cause between the same parties. For to say, that this declaration and the imparlances certified were in this cause, is to aver against the record.

Powell justice. There are imparlances in the common pleas from term to term; but when the clerks make up the record, they make it up as of that term of which the judgment is given. We cannot take notice of this declaration and the imparlances certified, because it is contrary to the record.

The judgment was affirmed.

Yelv. 108.
2 Lev. 69.

Mr. Salkeld cited the case of *Booth v. Beard*, 1 Lev. 61. and 1 Keb. 177, 197, 238, 327. to maintain, that the original in a term after the imparlance is not good. As to the difference taken in *Levinz*, where it is said, that the record was made up with an *alias prout potest de termino sancti Michaelis*, and so that it differed from this case, where the record is all of the same term; he tells me, that the record of that case was in court, and was made up as this; and the other matter appeared upon the return of a *certiorari* as here, and that he offered it to the court to be read.

The chief justice said it was a senseless case.

Easter Term

4 Annæ reginæ, B. R. 1705.

Vivian *vers.* Champion.

S. C. Salk. 141.

IN an action of covenant the plaintiff declares, *quod cum* his ancestor *per quandam indenturam suam factam apud, &c.* *cujus quidem indenturæ alteram partem sigillo J. S. leaving out sigillatam, idem* the plaintiff *in curia profert, &c.* had demised to the said J. S. the premises for ninety-nine years, if three lives should live so long; and sets out a covenant in the lease, whereby the lessee covenanted to repair the premises from time to time, and to leave them repaired at the end of the term; and shews, that the lessee assigned to the defendant, and that 15th Decemb. 8 Will. 3. his ancestor died seised, and the reversion descended to the plaintiff, and assigns the breach, *quod post consecutionem dictæ indenturæ* of assignment to the defendant, *et post mortem* of the ancestor of the plaintiff, *et post* the descent of the reversion to the plaintiff, *viz.* 1st April tertio of the queen, *et per decem annos tunc ultimo elapsos*, the defendant had permitted the premises to be out of repair. Upon issue joined, whether the premises were out of repair, there was a verdict for the plaintiff, and intire damages. And now serjeant Darnall moved in arrest of judgment, that the breach was laid in part in the ancestor's time, and consequently, that the plaintiff had recovered damages for a breach in his ancestor's time, which was ill. The death of the ancestor is laid 15th Decemb. 8 Will. 3. and the breach is, that the defendant 1st April tertio, *et per decem annos, &c.* which reaches to a matter of four years before the ancestor's death. Secondly, that it did not appear, that the lessee sealed the counterpart, by reason of leaving out the word *sigillatam*, and the jury he said gave damages for the whole ten years. And he said, it was a hard action: for may be the lessee might leave the house in repair at the end of the term, or else would be liable to an action, and that therefore it was usual to give but small damages.

In covenant by an heir against a tenant for suffering premises to be out of repair, no objection can be taken to the breach tho' part of the time during which it states that the defendant suffered the premises to be out of repair, was in the life-time of the plaintiff's ancestor. S. C. Holt 178.

In such an action the plaintiff ought to have, by way of damages, as much as will put the premises into proper repair. S. C. Holt 178. R. acc. ante 798.

No objection can be taken to the pleading of an indenture tho'

It is not expressly stated to have been sealed either after a verdict, Vide post. 1538. or after the adverse party has pleaded over. Vide post. 1536.

Holt chief justice. If the premises were out of repair in the ancestor's time, yet if the lessee suffers them to continue out of repair in the time of the heir, that is a damage to

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1 Vent. 109.

to the heir, and he shall have an action. And in these actions there ought to be very good damages; and it has been always practised so before me, and every body else that I ever knew. We always enquire in these cases, what it will cost to put the premises in repair, and give so much damages, and the plaintiff ought in justice to apply the damages to the repair of the premises. The breach is certainly and well enough assigned, by saying that *post mortem* of the ancestor, and the descent of the reversion to the plaintiff, viz. the first of *April tertio* of the queen, the defendant permitted, &c. and the *decem annos*, being repugnant, are void. And as to the ten years being considered in the damages, that cannot be, for that matter is ordered as before. As to the other exception, he said it was admitted by the defendant's plea over; or if not so, yet the verdict would help it.

All the court agreed with the chief justice; and though the serjeant pressed to have the cause stayed, the court would make no rule in it.

Smith *vers.* Goffe.

S. C. Salk. 457.

Notice need not be given of the performance of an act in favour of a third person according to agreement, if the agreement ascertained who that third person should be.

Vide 4 Mod.
230.

Tho' such performance was a condition precedent upon which a duty was to arise.

IN an action upon the case the plaintiff declared, that whereas one *H. M.* was bound to the plaintiff in 60*l.* upon condition to pay 29*l.* and interest, &c. the defendant, the money not being paid, did promise the plaintiff, that if he would deliver up the bond, the defendant would pay, &c. and avers, that the plaintiff did deliver up the bond to *H. M.* unde the defendant *notitiam habuit*: and yet, &c. Upon *non assumpsit* pleaded, there was a verdict for the plaintiff. And now Mr. *Eyre* took two exceptions in arrest of judgment: first that it was not laid, that the plaintiff gave the defendant notice of his having delivered up the bond, and that ought to have been averred: and for that he cited 1 *Cr.* 571. where a man promised to pay another so much money, when the other returned from *Hamborough*; and in a declaration upon this promise, the plaintiff set out his return from *Hamborough*, but did not shew that he gave the defendant notice of it, and for want of that a judgment given for the plaintiff in the marshal's court was reversed. Secondly, that the bond ought to have been delivered to the defendant within the meaning of the promise, that he might have had it as a security for the money paid by him on the be-

Under a promise by a third person to pay money if the obligee of a bond which was not paid by the obligor would deliver it up, it is to be intended that the promisor meant that the bond should be delivered up to the obligor.

Under such promise, if the plaintiff delivers up the bond, he is not bound to give notice thereof to the promisor.

half

half of the obligor. And he compared it to the cases of actions upon promises, where it is not said in the declaration, to whom the promise was made, or to whom the money was to be paid, it shall always be intended to the plaintiff in the action. So here, the delivering up of the bond being the ground of the action against the defendant, those general words must be understood of a delivering up to the defendant, who is the person to be charged by the delivering up.

Sir *James Mountague* for the plaintiff said, that these general words must be understood of delivering to the obligor. And as to the notice, he said, that if it was necessary to lay it they had done it; but that it was not necessary in this case. For the defendant having taken upon him to pay the money upon the delivering up of the bond to the obligor, and the person being certain, so that the defendant might have informed himself, he is bound to take notice at his peril. And he cited the case in 3 *Cro.* 97. *assumpsit*, in consideration that the plaintiff at the request of the defendant agreed to give his bond to *J. S.* for the debt of the defendant, the defendant promised to save him harmless, and avers that he gave the bond, and was sued, &c. and exception taken for want of the plaintiff's averring, that he gave the defendant notice of his giving the bond and over-ruled, because there was a person certain appointed, to whom the bond was to be given, and the defendant might inquire of him, and therefore is bound to take notice. So in the case in 1 *Lev.* 47. covenant to pay all such sums of money as shall be charged by the plaintiff upon *A.* to be paid to *B.* and says, that he charged so much money upon *A.* to be paid to *B.* and that the defendant had not paid it, and good without shewing that he gave defendant notice of what sums of money he had charged upon *A.* to be paid to *B.* upon the same reason.

The chief justice said, a sack full of cases might be cited upon this head.

Holt chief justice. Which way soever you understand the words, deliver up the bond, the plaintiff had no need to give notice. If you understand it, that the bond is to be delivered to the obligor, then there needs no notice; because the obligor being a third person, the defendant may come to the knowledge of it. So if *H.* promises *J. S.* that in case he will deliver him such goods, he will give him as much for them as *J. N.* gave for the same sort of goods; *H.* may bring an action, and declare that *J. N.* gave so much, and it will be good, without averring, that he gave *J. S.* notice what it was *J. N.* paid him: for *J. N.* being a third person, it lies as much in the notice of *J. S.* as it does

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does in *H's* what he gave. If you understand the consideration, that the bond was to be delivered to the defendant, that is notice of itself. Secondly, the meaning of the promise is, that the bond shall be delivered up by way of discharge of the debt, and consequently it must be delivered up to the obligor. For the consideration must be understood of the most effectual delivering up, and then that must be such a delivering up as that the bond may be cancelled.

Powell justice. This case was moved before in the absence of the chief justice, the last day of last term. As for the objection of the want of notice, that has no weight, because there is a person certain named, to whom the bond is to be delivered up, of whom the defendant might inform himself. And the difference is, where the defendant has no way to come to the knowledge of this performance of the consideration, or the time when the promise is to be performed: as if a man in consideration, &c. promises to pay another so much money upon his marriage, there the plaintiff ought to give notice that he is married; otherwise where there is a person certain named, as there is in this case, to whom the defendant may resort and inform himself. So there needs no notice to be given of a matter, which a man is awarded to do, because a man may inquire of the arbitrators. As to the other, he said, that delivering up of a bond imported in common parlance a different thing from assigning it, and imported a giving it up to the person that gave it.

Holt chief justice said, that in that case put by *Powell*, the plaintiff need not give notice of his being married, because it was a thing notorious of itself.

Powell strongly of the contrary.

Holt said, that the difference was, where the consideration, &c. is to be performed, and no person is named to whom it is to be performed; and where a certain person is named, as here.

Judgment was given for the plaintiff, *nisi causa tomorrow*.

Mayor of Winton *vers.* Wilks.

IN an action upon the case, the plaintiff declares, *quod cum civitas Winton est et a tempore, &c. fuit antiqua civitas, et in eadem civitate habetur et a tempore, &c. habebatur consuetudo, quod non liceat alicui personæ præter homines liberos de gilda mercatoria civitatis illius ad utendum vel exercendum publice infra eandem civitatem aliquod misterium, artem sive manualement occupationem in dicta civitate, toto tempore supra dicto usatam, nisi huiusmodi persona per spatium septem annorum prius educatus fuisset tanquam apprenticius in eadem civitate ad vel in huiusmodi misterio, arte, sive occupatione, aut ad inde aliter fuit legitimo modo authorizatus secundum morem civitatis illius, &c.* yet the defendant, &c. bringing him within the custom, *ad damnum* of the plaintiff, &c. upon not guilty pleaded, there was a verdict for the plaintiff, and the court was moved in arrest of judgment; and it being a cause of consequence, it was ordered to be put in the paper; and it was argued by Mr. King for the plaintiff, and Mr. Eyre for the defendant, some time since. And now it was argued by Mr. serjeant Darnall for the plaintiff; and he said, that there were two objections made: First, that a custom of excluding persons from exercising a trade within a particular place is a void custom, and if it were not so in the general, yet this custom, as here set out, is void. Secondly, that if the custom were good and well set out, that the action was misconceived, because it ought not to have been brought by the mayor and corporation, but by the guild of merchants. First, that such a custom in the general is good, has been settled in *Waganor's case*, 8 Co. and that case is a strong authority for us.

Holt chief justice said, that case was of such a custom in London; but he would be glad to see a case, where such a custom had been allowed good in any other borough or city.

He said, that such a custom is admitted to be good in *Palm. 2, 3, 4, 5.* and by Mountague chief justice, in the case of *Jolly vers. Broad. 2 Roll. Rep. 203.* and that in a case, which was in the common pleas, the corporation of *Totness vers. Cowden*, in such an action as this, it was never made a point: but that case was never adjudged. He said, that the difference as it stood upon *Waganor's case* is, that such a privilege granted to a city, &c. by charter is not good: and therefore no city founded within time of memory can have such a privilege. But it can only be in ancient cities, &c. by the ancient custom of the place. He said, that such a custom might be intended to have a reasonable commencement, by agreement among the in-

not served an apprenticeship, or was not otherwise authorised, is bad. Vide Hob.

Q. Whether such a custom is in the general good. S. C. Salk. 203. 3 Salk. 349. Holt. 187. Vide Cro. Elia. 803. Cart. 62. 114. Com. 269. 1 Will. 233. 2 Will. 266. Burr. 1951. 322. Str. 675. Holt 129.

Intr. Trin. 3
Ann. B. R.
Rot. 214.

A declaration against a man for exercising a trade in a particular case contrary to a custom for excluding all except persons of particular descriptions from trading there, must shew that the franchise of exclusion is vested in the person or persons suing. S. C. Salk. 203. 3 Salk. 349. Holt 187.

An allegation that there was a custom in a corporate city that it should not be lawful for any persons except the freemen of the merchant guild of the city to trade there unless he should have served an apprenticeship within the city, &c. does not prove that it is vested in the corporation. S. C. Salk. 203. 3 Salk. 349. Holt. 187. In such action the custom must shew expressly all the descriptions of persons not prevented by it from trading; stating that there was a custom that no person should trade who was not free, had

35. Moore 871.

Holt. 187. Burr. 1951.

habitants,

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WILKS.

habitants, upon their first settling there. And that such cases, which are founded upon tenure between the lord and tenants, to have the sole trade within a manor, &c. are good upon that reason. But that if no such good reason could be given for such customs, it is not reasonable to inquire into them now. And he cited the case in the Register, 105. b. the custom of Rippon, *quod archiepiscopus Eboracensis ratione domini sui de Rippon talem libertatem in villa prædicta habeat, &c. quod nullus in eadem villa uti debeat seu consuevit officio sive misterio tintoris, sine licentia ipsius archiepiscopi.* And such a restraint may be good as well to all trades as one. And he cited another case, which is also cited in the case of the city of London, 8 Co. 125. a. b. a custom for the lord of the manor of H. to have frank foldage over all the ville of H. as well within his seignory, as without. He said, that though *Waganer's* case was of such a custom in London, yet upon the reasons, on which that judgment was founded, there would be no difference between such a custom in Winchester, and such a custom in London: that that which differs London from other cities, viz. the confirmation of their customs by acts of parliament, was not taken notice of in the resolution of that case; and that indeed it would have little weight, for if the custom were a void custom, the confirming acts would not make it good; for they confirm only good customs. As to the exception to the setting out of the custom, that it was too generally laid, to say, *out ad inde aliter fuit legitimo modo authorizatus secundum morem civitatis illius*, without shewing how that was to be, he said, that in the case of *Day vers. Savage*, Hob. 85. in trespass for taking goods, the defendant justifies by custom to distrain the goods of persons not lawfully thereof discharged, and refusing to pay wharfage, which he said, was as general as this: [Note, it never came to be a question in that case, whether such general pleadings were good or no.] That the forms of declarations were altered, and that short ways of declaring were used: that to have said no more in a declaration for disturbing a man of his common, than that the plaintiff *habere debuit communiam*, would have been thought strange heretofore; but that in the case of *Strode vers. Bird*, 4 Mod. 411. cit ante 266. such a declaration was held good upon demurrer; and the great reason of that case will come to this, viz. that the right would come upon evidence upon the general issue; and so will the authority in this case. And as to the second objection, that the guild of merchants ought to have brought this action; he said, that being free of the guild of merchants, was but one of the qualifications which would intitle a man to set up a trade; but if he had either served seven years apprenticeship, or were free by redemption, he might set up a trade. And therefore it was not a damage to the guild of merchants only, but was as much a damage

damage to every freeman: and consequently, if the guild of merchants might bring an action, every freeman might bring an action. He said, the mayor and corporation must bring the action for another reason, viz. that a corporation by letters patent, as the guild of merchants was, could not maintain this action, but only a corporation by prescription, such as the city was.

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Mr. Raymond argued for the defendant, that this was an unreasonable custom, and consequently void; for as *Litt. sess.* 169. is, *consuetudo* must be *ex certa causa rationabili usitata*; and as Coke's commentary is, *consuetudo contra rationem introducta potius usurpatio quam consuetudo appellari debet*. It is unreasonable upon two accounts; first, with relation to the person that is bound by it; and secondly, to the publick. As to the first, every man at common law might use what trade he would without restraint: so is *11 Co.* 53. *1 Saund.* 312. and this custom depriving the inhabitants of that city of this liberty, and not giving them any consideration or recompence for it, is therefore unreasonable and void. Secondly, the freedom of trade tends to the increase of trade, and is a publick benefit, and consequently the restraint of trade is an injury to the publick. This custom cannot be intended to have a reasonable commencement, because it cannot be intended, that all the people of *England* could, if they would, consent to it. And besides, by the common law, a man (a) cannot restrain himself from using a trade generally all over *England*, though (b) upon good consideration he may restrain himself from using it in such a particular place. And so is the difference upon the case of *2 Hen.* 5. 5. pl. 26. *1 Jones* 13. *Jolliffe* vers. *Broad.* S. C. *2 Cro.* 596. *Allen* 67. *Grosse* vers. *Pragnall*, 3 *Lev.* 241. He said, that (c) a grant by the king, by his letters patent, in restraint of trade, is void, *11 Co.* 84. *Darcy's* case; and the case of the *Canary* company, *1 Sid.* 441. where the king grants to A. and B. the sole trade to the *Canary* islands, and that if any one traded thither without their leave, the ship and goods should be forfeited to them; and the patent was held to be void. By the same reason a corporation erected by the king's letters patent cannot (d) make a by-law in restraint of trade, as that only persons so and so qualified shall use any trade within that corporation, *8 Co.* 125. *Hob.* 210. Neither can a corporation by prescription, that has a power to make by laws by custom, make such a by-law. And so it was resolved in the case of the corporation of *Bedford* vers. *Tix*, *1 Lutw.* 562. *Trin.* 2 *Will.* 3. *Rot.* 416. *Lambert* vers. *Thompson*. And if such a by-law made by virtue of a custom is not good, neither is the custom itself good; for the derivative has all the efficacy that the principal has. *Waganor's* case, upon which the serjeant

(a) R. acc. post. 1456. and see the books there cited.

(b) R. acc. post. 1456. and see the books there cited.

(c) Acc. 3 Co. 125. a.

(d) R. acc. 31 Co. 53. *Salk.* 143. *Lutw.* 562. *Com.* 269.

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has so much relied, materially differs from this case, upon account of the several acts that have been made for the confirming the customs of *London*. And that those acts were insisted upon, appears by the return, *fol. 122. a.* where the act of *Rich. 2.* is set out, and *126. a.* where it is said, that there are divers customs in *London*, which are against common right, and the rule of the common law, and yet are allowed in our books, *et eo potius*, because they have not only the force of a custom, but are also supported and fortified by authority of parliament: and *129. a.* where among the grounds of the resolution, which my lord *Coke* sums up, he reckons the acts of parliament. And upon this ground it is, that though a *capias* cannot be awarded before a summons, even by the custom of a court, as *2 Roll. 277.* is, yet by the custom of *London* after a plaint, the defendant may be arrested by his body, as *9 Co. 68. a.* *Mackally's* case is; and the reason given by the book is, because the custom of *London* is established and confirmed by parliament: so *8 Co. 129. a.* a citizen and freeman of *London* may devise in *mortmain*, notwithstanding the statutes of *mortmain*; for all the customs of *London* are established and confirmed by act of parliament. Besides, he said *Waganor's* was discharged, as appears by the report of the case, *2 Brownl. 284.* As to the other cases cited by the serjeant, he said, they were cases between landlord and tenants, and went upon the tenure. As for the case of the custom of *Rippon*, *Register 105*, that was a restraint of one particular trade only, and that too a trade, that was accounted a nuisance, as appears by *9 Co. 59. Rast. Intr. 442.* [Note, the words in that case, *ratione dominii sui de Rippon.*] He urged, that the guild of merchants ought to have brought the action, and not the mayor, &c. of *Winchester*; for the persons, whose franchises are broke, and who are thereby grieved, ought to bring the action. And accordingly, in *1 Lev. 262.* the action is brought by a freeman; and in *3 Cro. 803.* by the corporation, in whom the franchise is laid to be. But here the franchise is laid in the guild, and therefore the guild ought to bring the action, and not the mayor, &c. for it is no franchise of the city, nor consequently does an infringement of it intitle them to an action. And upon this case, in *3 Cro.* he took an exception to this declaration, that the plaintiffs did not shew themselves to have been incorporated; or that they had this name of corporation given them, nor how, as the case in *3 Croke and Hob. 210.* is. [Note, in that case *211.* my lord *Hobart* says, it is not necessary for a corporation in such case, to shew how they were incorporated, for the name argues a corporation, and the like of cities, and upon *nil debet*, &c. it must be proved.] As to the other objection, he said, they ought to have shewed particularly and certainly, what the other qualifications were, and that it was not enough to say generally,

aut

fuit ad inde aliter fuit legitimo modo authorizatus secundum morem civitatis. As to the case of *Stroud vers. Birt*, he said, that differed exceedingly from this, for there the action was against a wrong doer, but here against a man for doing a lawful act, and therefore in this case there ought to be a certain title set out, though there need be none in that case. And besides the generality of the laying the custom, it was ill laid in that manner of laying it *secundum morem civitatis*, whereas it ought to be laid directly, that there was such a custom. And for that he cited the case of *Devered vers. Ratcliff*, 3 Crb. 185. 2 Leon. 29. where in an action of escape, that J. S. being in his custody, &c. was charged in his custody *secundum consuetudinem*, and that was held to be ill. And *Hil. 8 Will. 3. Rex vers. Bernard*, an indictment against a man for refusing to serve the office of constable, being duly elected by the inhabitants of the town *secundum consuetudinem*, was quashed for want of shewing a custom in the inhabitants to chuse.

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Holt chief justice said, that this point had not been so well settled; that even in *Waganor's* case, which was the ground-work on which the plaintiff's counsel built, the defendant was discharged. That it came in question again in the common pleas in 18 and 19 Car. 2. *Cart. 68. 114.* in a case relating to the town of *Colchester*, where such a custom was laid, and a by-law grounded upon it, and the case had great agitation, but was never determined. I have the arguments of that case in a report under chief justice *Bridgman's* own hand. The point is stated in *Norris and Stamp's* case, *Hob. 210.* There is no reason to support such a custom, especially to give the corporation an action; for this exercising a trade, though by a person not qualified, is no prejudice to the corporation. All people are at liberty to live in this place, and their skill and industry are the means they have to get their bread; and consequently it is unreasonable to restrain them from exercising their trades within this place, within which having a liberty to live, they ought also of consequence to have all lawful means of supporting themselves. What was the foundation for making the statute of the 5 Eliz. but the general liberty of trade, which all persons had before the statute? The custom of *London* for excluding persons from using trades there, that are not free, is founded upon customs that they have relating to the bringing up of the youth within their city, and qualifying them to be freemen of it, which other cities have not, and therefore such a custom is reasonable there; but it does not follow from thence, that it is reasonable elsewhere, where they have no such custom. By the custom of the city of *London* they have a power to make infants be apprentices, and they are bound by the covenants in their indenture of apprenticeship. If an apprentice is not inrolled, he may sue out his indentures of apprenticeship, and

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In trespass a-
gainst a com-
moner, he can-
not give his right
in evidence on
not guilty.

and thereby he will be discharged; but till then the binding is good. There is also a custom of turning over apprentices. And when a person has served his apprenticeship in *London*, he has a right to be free. These customs are a good reason for excluding all foreigners from exercising any trade in *London*. He said, that the words *gilda mercatoria* signify a corporation, and that where the king in antient times granted to the inhabitants of a ville or borough to have *gildam mercatoriam*, they were by that incorporated, 10 Co. 30. a. but what it signifies here in this declaration nobody knows; for the plaintiff does not shew what it is, but only says, that it is not lawful for any person to exercise a trade, that is not free of the *gilda mercatoria*. He said, the case of *Strode vers. Birt* cited by the serjeant was nothing to the purpose; for the common was sufficiently described in that declaration. And though there was no title set forth, yet that was well enough, because the defendant was a wrong-doer; and if the defendant were really owner of the land, he might plead *liberum tenementum*, and that would force the plaintiff to reply a title. It has been held, that in trespass against a commoner, he may plead not guilty, and give his right of common in evidence; but I cannot think so, but he ought to plead specially, and shew his title: otherwise of the lord of the waste, he may plead not guilty, and give his title in evidence.

Powell justice said, that in the case in the common pleas, the declaration was more special, and the custom set out more at large, and it was laid as a franchise in the corporation. I thought the corporation might maintain the action, but *Treby* chief justice was of another opinion, because the mayor, &c. of *London* would have brought an action in *Waganor's* case, and not have made a by-law, and brought an action upon that. But indeed I thought, that a franchise might be vested in a corporation for the benefit of the members of it, for the breach of which they might bring an action. Which *Gould* agreed. He said, that a custom to exclude people from exercising a trade, was a strange custom; but if that were the point now to be determined, he would consider well of it, because the giving judgment to set aside such a custom, would have a very great influence; because such a custom is claimed in most corporations by prescription; but that there would be no need to come to that in this case, for that this declaration was naught: first, for not shewing that there is such a franchise in the corporation; for as this declaration is, the corporation would maintain an action for breach of their franchise, without shewing they have any: for the franchise is laid by this declaration in the *gilda mercatoria*, and we cannot take notice, that the *gilda mercatoria* and the city are all one, though they may be so; and upon the evidence it seemed probable they were so. Secondly, they ought to have set out specially, what the custom

custom of the city is, and not have come so generally, as *aliter legitimo modo autorizatus secundum morem civitatis*. For who can tell what that custom of the city is? This is to maintain an action upon a custom, without shewing what the custom is. *Powys* justice went upon this last exception; and *Gould* justice was also of opinion, that the declaration was ill, and that therefore there was no occasion to give any opinion upon the principal point.

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Powell who was a judge, and *Gould*, who practised in the common pleas, was counsel in the cause cited by *Darnall*. Both agreed, that that cause was never determined there, and that the point of the custom was never spoken to, but taken as admitted. But *Gould* said that his clients the corporation despaired of judgment.

Serjeant *Darnall* mentioned a cause in this court, where the corporation had judgment in such an action as this upon the same declaration. But to that *Gould* said, that he intended in that cause to have moved in arrest of judgment, but that the plaintiffs being easy with the defendants, he advised his clients the defendants to agree the cause, and accordingly they did; or else that had been moved.

Holt chief justice said, he would give judgment for the plaintiff, if he could tell why. Judgment was entred, *quod querentes nil capiant per billam; per curiam*, on the exceptions to the declaration.

Sheriffs of Middlesex *vers.* Barnes.

IN an action of debt upon a bail-bond, the plaintiffs declared thus: *A. B. et C. D. viccom. Middlesexiae prae-dictae queruntur, &c.* And upon a sham plea pleaded, there was a demurrer. And now Mr. *Southouse* took exception to the declaration, that it ought to have been *queritur*, and not *queruntur*, because the bond is taken by them as officers by the name of their office, and they declare by the name of office, and they both make but one officer.

In debt upon a bail-bond by the sheriffs of Middlesex; tho' they stile themselves sheriffs in the declaration, and declare in the plural number, no objection can be taken on that account, unless the bond appears upon the record to be a bail-bond.

Holt chief justice said, that if the plaintiffs had not named themselves sheriffs in the declaration, yet it had been a good declaration *prima facie*; but indeed, if the defendant had craved *oyer* of the bond and the condition, and upon that it had appeared, that it was a bail-bond, that might have been ill. He said, that the debt vested in them, in their natural capacity, otherwise upon their deaths it ought to

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go to their successors, like the chamberlain of London's case; which it would not do, but to the survivor, and upon his death to his executors.

Powell said, that unless the defendant had craved *oyer* of the bond and the condition, and it had been entred upon the record, they could not take notice, that it was a bail-bond. Judgment was given for the plaintiffs.

Aubery *vers.* Barton.

A woman may sue in the spiritual court for defamation charging her with whoredom. R. acc. ante 508. 637. 1101. Post. 1287. Str. 323.

Vide Com. Prohibition. G. 14. 2d ed. vol. 4. p. 507.

These words, "You are a brandy-nosed whore, you stink of brandy," are a charge of whoredom.

A Woman libelled against another in the spiritual court for these words; "You are a brandy-nosed whore, you stink of brandy." And Mr. *Earle* moved for a prohibition, because they were words of heat, and did rather charge the defendant with intemperance than incontinency. And he relied upon 2 *Roll. Abr.* 296. n. 15. a prohibition was granted to a suit by the mother for these words; "Thou art the son of a whore, and thy mother was a bitch;" and *W. Jones* 44. a precedent cited 3 *Jac.* of a prohibition granted for these words; "Thou art a whore, and a trained whore, and a dirty whore;" and it is said there, that for the word *whore*, without mentioning any particular act of incontinency, no suit can be maintained in the spiritual court; and 1 *Cro.* 110. "Thou art a cuckold and a wittol, which is worse than a cuckold;" the wife cannot sue in the spiritual court for these words. 2 *Keb.* 334. a prohibition granted to a suit for these words; "A whore and an arrant whore;" (but the court there ordered, that a declaration should be delivered, in order to settle the point). 2 *Keb.* 581. a case cited 11 *Jac.* "Thou art a whore, and I was never stricken by a whore's hands before," and a prohibition granted: another 21 *Jac.* "He had run away out of England into Ireland but for his whore, *Short's* wife, who is his whore;" and there also a prohibition granted (but note, the principal case in 2 *Keb.* 577. and 581. was a suit in the spiritual court for calling the defendant whore, and the plaintiff suggested, that it was spoken in heat, *viz.* that the defendant called the plaintiff rogue, and the plaintiff called the defendant whore; and *Twisden* there said, that before 8 *Caroli.* it was a brangled question, whether a prohibition should be granted for these words, and that prohibitions had been sometimes granted, and sometimes denied; but that then it was settled, that no prohibition should go, and prohibitions have been denied generally since. See 3 *Lev.* 119. *Vincent vers. Alpy*, where the mother was libelled in the spiritual court for saying of her son, "He was a rogue and a rascal, and a son of a whore;" and the court granted a prohibition.

"of a whore." And the case in 2 Roll. 296. was cited, as a ground for a prohibition, but the court differed this case from that, because there the words, "and your mother is a bitch," make the first words insensible: but here the words import, that the woman was a whore, which is an ecclesiastical scandal, and therefore the court denied a prohibition, which seems to come up to Mr. Earle's case in all the views of it.)

Holt chief justice said, that a prohibition had been denied in this case forty times.

Powell justice said, that the (a) court granted a prohibition, where the suit in the ecclesiastical court was for such words spoke in *London*, upon this special reason, because an action will lie for them in *London*, upon account, that a woman that is a whore in *London*, may, by the custom of *London* be carted. And it being granted upon such a special suggestion, is an argument, that the spiritual court may proceed, where the words are spoke elsewhere. He said, he moved once for a prohibition to a suit in the ecclesiastical court for calling a woman jade, but could not prevail. But Holt said, he would have granted one in that case.

(a) Vide ante
103. 1 Will. 62.

And in this case the prohibition was denied.

Stephens *vers.* The manucaptors of Hudson.

A *Scire facias* against bail, the defendants pleaded payment of the money by the principal, &c. the plaintiff replied, *non solvit, &c. et hoc petit, quod inquiratur per patriam, et prædicti defendantēs similiter*. The defendants demurred, and the paper-book was made up, without striking out the *prædicti defendantēs similiter*: the record was a record of last term. And now this term the cause came on in the paper, and this exception was taken by Mr. Whitaker for the defendants, and the cause stood an *ulterius consilium*. And in the mean time Mr. serjeant Hall came and moved for leave to strike out these words, *et prædicti defendantēs similiter*.

Amendment by striking out *prædicti defendantēs similiter*, after the cause was in the paper. If the plaintiff avers the similarity for the defendant, and he demurs without striking it out, and the demurrer book is made up with it in, the court will let it be struck out after the demurrer has been argued.

The court held, that it was a thing of course, for the party that takes the issue to join the issue for the other, upon a supposition, that they will join in the issue, to maintain the fact they have alledged; and therefore if they will not join in the issue, but will demur, they ought to strike it out, and the leaving it in is a trick; and therefore the court gave leave to strike it out.

Note, these amendments are now made every day on payment of costs. Note to the 3d Edition.

Inte. Pasch. 3
Ann. B.R. Rot.
139.

Fanhaw *vers.* Morrison.

Upon the return
of a nihil to an
alias scire facias
the defendant
may appear.

A recognizance
in error upon a
judgment in debt
may be con-
ditioned that
upon a non-
solvit, dis-
continuance
or affirmance,
the cognizor
should pay, &c.
S. C. Salk. 520.

In a scire facias
inde a plea that
the plaintiff in
error did prose-
cute the writ
with effect, and
assigned errors,
and that the
plea thereon remains undetermined, is good. S. C. Salk. 520.

In such plea the
defendant need
not shew whe-
ther the plaintiff
in error prose-
cuted by attor-
ney or in person.

Nor make any
conclusion to
the record. S. C. Salk. 520. Nor shew the proceedings upon the writ of error at large. The traverse of a matter which is to be tried by the record, is bad. S. C. Salk. 520. vide Com. Pleaders G. 6. 2d. Ed. vol. 5. p. 113. Therefore upon such plea the plaintiff cannot traverse that the plea upon the writ of error remains undetermined. S. C. Salk. 520. And an allegation in the inducement that the judgment is affirmed will not cure it. S. C. Salk. 520. If a writ of error upon which a record was removed appears to have described it improperly, it shall be quashed, tho' the case has been argued upon the merits, and the judgment appears erroneous. S. C. Salk. 520. Sed vide 5 C. 1. c. 13. l. 1.

A Writ of error of a judgment given in the common pleas in a *scire facias* upon a recognizance; the recognizance was entered into, upon bringing a writ of error upon a judgment in the common pleas, in an action of debt; and was conditioned, that if the plaintiff in error should be nonsuited, or the writ of error should be discontinued in his default, or the judgment should be affirmed, that then the plaintiff should pay, &c. The defendants pleaded, after *oyer* of the *scire facias* and the condition, that the plaintiff in the writ of error did prosecute the writ of error with effect, and did assign errors, and that *placitum super prædictum breve de errore adhuc pendet indeterminatum*. The plaintiff replied, that the judgment was affirmed, *absque hoc quod* the plea *adhuc pendet indeterminatum*. And to this there was a demurrer, and judgment was given for the plaintiff below.

This case was formerly debated upon an exception to the manner of assigning the breach in the *scire facias*, and that exception was allowed; but upon the plaintiff's applying to the common pleas, that fault was amended. And Mr. *Weld* took an exception to the traverse in the replication, that it was a traverse of a matter of record, which was ill: because a matter of record could not be put in issue to be tried by the country. Whereas he ought to have replied, that the judgment was affirmed, *prout patet per recordum*. This exception was taken last term, and the cause adjourned over upon it. And Mr. *Weld* then took another exception, that the defendant appeared contrary to the return of the writ, both the *scire facias*'s being returned *nihil*.

But *Holt* chief justice said, that the books said, that two *nichils* returned amounted to a *scire feci*; and that upon two *nichils* returned, the plaintiff would have judgment.

Powell justice said, that the defendant's appearance was well, because the *scire facias*'s were entered upon the roll, and the defendant had day by the roll. So that exception was over-ruled.

Now this term Mr. *Whitacre* for the defendant in error argued, that the plea was ill: first, because the plea is to the second *scire facias*, and he has only pleaded, *quod ante prosecutionem prædicti brevis de scire facias* he prosecuted with effect, and that he might have done,

and

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and yet have been defective in prosecuting with effect before the bringing the first *scire facias*; and therefore he ought to have pleaded it, that before the prosecuting the first writ of *scire facias*, &c. Secondly, that he does not shew, whether he prosecuted the writ of error in person, or by attorney; and being at liberty to do it either way, he ought to shew which way he did it. Thirdly, he pleads that he assigned errors, but does not conclude with an averment to the record, as he ought to do, that being a matter in the affirmative, and a matter triable by the record, to which the defendant may plead *nul tiel record*. Fourthly, that the plea is only general, *quod placitum*, &c. *pendet indeterminatum*; whereas he ought to have pleaded in the words of the condition, that the writ of error was not discontinued, nor the plaintiff in error nonsuited. And he said, that it was a rule, that wherever you plead performance of a condition, or assign a breach for non performance of it, you must do it in the very words of the condition; therefore in debt upon a bond conditioned to deliver writs such a day, a plea that the defendant delivered them *secundum formam conditionis*, is ill, 1 Lev. 145. So an award was to pay money *ad vel ante* such a day, and in debt upon bond for non-performance of this the plaintiff assigned a breach, that the defendant had not paid the money upon the day, and ill; though it was agreed, that payment before the day would upon evidence maintain the issue of payment upon the day. 3 Lev. 293. 2 Ventr. 221. Dier 243. b. Fifthly, the defendant should have pleaded, that the writ of error was returned such a day, and then have shewed at large what proceedings were had upon it, and not have pleaded generally, that he prosecuted the writ of error with effect, but have shewed *coment*. Sixthly, all the plea is made up of matter of record, and yet there is no conclusion to the record. As to the traverse in the replication, the substance of the plea is *pendet*, which is an affirmative, and that is what is traversed; and the *indeterminatum*, which is the negative, shall be rejected, or it is no more than *pendet*.

Weld for the plaintiff in error argued, that the plea was, that he had prosecuted the writ of error with effect, and that *placitum*, &c. *pendet*; and that shewed sufficiently, that the recognizance was not forfeited, and there was no need to plead in the words of the condition, that it was discontinued, &c. for that was included by saying *pendet*. For it could not be depending, if it were discontinued; and it was not material, whether he prosecuted the writ of error in person or by attorney, for either was prosecution within the intent of the statute, to save the recognizance. And as to the concluding of the plea with an averment, and not to the record, he said, that the plea, *quod placitum*, &c. *adhuc pendet indeterminatum*, was a negative, and therefore ought to be

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be concluded with an averment, and not to the record, because it cannot be tried, nor can any issue be joined upon it. And as to the assigning of errors, there was no need to conclude to the record as to that, because it was not material to be alleged, being no part of the condition of the recognizance. Then he took an exception to the recognizance, that it was void, not being pursuant to the statute 3 Jac. 1. c. 8. which gives it in this case, and is only to prosecute the writ of error with effect; but recognizances with these special conditions in this form ought only to be taken in dower and ejectment, in which they are given by the 16 & 17 Car. 2. c. 8.

A plea of performance of the condition of a bond must shew a performance in the words of the condition,

Holt chief justice. If a man pleads performance to a bond with a condition, he ought to plead it in the very words of the condition; otherwise if he pleads a matter by way of excuse, as he does here; for this matter of a writ of error depending is only pleaded by way of excuse, why he has not paid the money. Which Powell justice agreed. The defendant's plea is in the negative, and therefore he is not to vouch a record for it; but if the judgment be affirmed you ought to shew that of your side, viz. ought to plead that the record was certified in the king's bench, &c. such a term, and that *superinde taliter processum fuit* that the judgment was affirmed, and conclude your plea *prout patet per recordum*; and if it were not so, the defendant may rejoin *nul tiel record*. Not prosecuting his writ of error by the plaintiff is no forfeiture of his recognizance, without giving him a rule below, in case where the record is not certified, to certify it, and then, if he does not certify it, nonsuiting him; or in case the record is certified, he does not forfeit his recognizance, unless you nonsuit him here above. And these matters all appear upon record; and therefore the plaintiff ought to shew, either that the judgment was affirmed, or that the writ of error was discontinued, or the plaintiff in error nonsuited, and it lies of his side. The traverse is naught, for it puts a matter of record in issue to be tried by the country. And as to the saying in the replication, that the judgment was affirmed, the plaintiff can have no advantage of that, because it comes in only by way of inducement to the traverse.

Powell justice. The replication is ill, for you make that the inducement to the traverse, that ought to have been the issue.

Holt chief justice said, that though the condition of the recognizance was particular, yet it was well enough, for they were no more than what the law implied: and *expressio unius est exclusio alterius*, &c. And Powell justice said, that ever since the statute of king Charles 2. they had pursued the words of that statute in the framing the conditions of their recognizances. And Holt chief justice said, that if there were

were no statute, which gave any such power, that the recognisance would be good; for any judge of this court, or of the common pleas, might take a recognisance by the common law. And if a man would enter into such a recognisance voluntarily, and there were no coercion used, it would be a good recognisance. So if a man upon a writ of error would enter into a recognisance in more than double the sum.

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Judges of the kings bench and common pleas may take recognisances by the common law. Acc. Vaugh. 102,

103. Str. 745. Recognisance in more than double the sum on error, good;

The court were just going to reverse the judgment, when Mr. Whitaker took an exception to the writ of error, that the writ of error was a writ of this queen's time, and recited a judgment *super quoddam breve nostrum de scire facias*; and the *scire facias* was brought in the late king's time, which appeared to be so by one of the continuances, in which it was entred, *ante quem diem dominus Willielmus, &c. diem clausit extremum*: and for this the writ of error was quashed, nisi.

Bell *vers.* Gipps,

DEBT upon a bond, condition to perform an award; the defendant pleaded no award; the plaintiff replied, and set out an award *ore tenus*, that the defendant should pay the plaintiff 21 l. and that the plaintiff should deliver up to the defendant such a bond, being the matter in controversy, to be cancelled, and that the plaintiff and defendant should give one another mutual releases to the day of the date of the said bond: and assigned a breach in the non-payment of the 21 l. And upon issue joined, there was a verdict and judgment for the plaintiff in the common pleas. And upon that this writ of error was brought. Mr. Page for the plaintiff in error took an exception to the award, that it was not final, for the delivering up of the bond would not destroy the effect of it, but still the plaintiff might bring an action on it. And as for the release, that was to be only to the day of the date of the said bond, which must be intended the bond that was to be delivered up, that being the bond that was last mentioned, and the controversies submitted were since that. In answer to which Mr. Smith for the defendant in error said, that it did not appear, the bond to be delivered up had any date, and therefore the words must be applied to the bond of arbitration, which had a date; and also that the word *datus* signified delivery, and therefore it must be construed to the day of the delivering up of the bond; and that it did not appear there were any other matters in difference, besides this bond: and that the court would not intend any, and if there were none, the release extending to discharge that bond, the award will be final. Besides the award was good without that, for there is money awarded to be paid on one side, and a bond to be delivered

An award that the one party should pay the other a sum of money, and that he should deliver up a bond (which gave rise to the dispute) to be cancelled, and that each party should give the other a mutual release to the day of the date of the said bond is good.

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livered up of the other to be cancelled. And he cited 2 Ventr. 242, that an award by *parol* should be favourably expounded.

Holt chief justice held, that the award was good. For this bond, which is awarded to be delivered up, was the foundation of all the controversies between the parties; at least it does not appear, that there were any controversies between them about any thing else, or that arose since the date of the bond; and therefore the awarding the bond to be delivered up to be cancelled, and a general release to the defendant to the day of the date of that bond, will make an end of all the controversies between them.

Powell justice held, that the award was mutual and final, if the release was left out of the case. And the judgment was affirmed.

The earl of Yarmouth *vers.* Russell.

A second writ of inquiry may be awarded before the first is returned. D. acc. post 1252. sed vide ante 821.

A *remisit damna* may be entered by attorney.

A Writ of error of a judgment in the common pleas by default in an *indebitatus assumpsit*, and a writ of inquiry awarded and several damages, and a *remisit damna* entered upon all the counts but one. And Mr. *Raymond* took two exceptions: first, that the inquiry was taken upon a second writ of enquiry, and that was awarded without returning the first, but upon a *vicecomes non misit breve* only to the first; and that he said was held ill in the case of *Atwood v. Burr.* ante 821. in a writ of error of an award of execution upon a *scire facias* upon a recognisance against bail in the court of *Maidstone*, and the proceedings were upon the *alias scire facias*, and that was awarded without any return of the first, and for that the judgment was held to be erroneous, 1 Annæ B. R. Secondly, that the *remisit damna* was not entered in proper person.

Holt chief justice admitted the case of *Atwood v. Burr*, but said that this was only a *sicut prius*. And as to the second he said, that it was not necessary that it should be so. And the judgment was affirmed.

Bullock *vers.* Parsons.

S. C. Salk. 454. Holt 496.

UPON issue joined in an action of debt, there was a verdict for the plaintiff, and Mr. Eyre moved in arrest of judgment, because the *distringas* was *de placito* with a blank, omitting *debiti*. The *venire facias* was right. And he said, that the court would intend that this was a *distringas* in another cause depending between the same parties, which Holt chief justice denied.

A defect in the *distringas* jurors may be amended after verdict.
R. acc. 2 Rol. Rep. 111. Sty. 374.

Mr. King for the plaintiff said, that this was a void *distringas*, and so as none, and consequently aided now after a verdict by the statutes of *jeofailes*; and if the court would not take it so, but to be only an ill *distringas*, yet they would amend it by the *venire facias*. And for that cited Hol. 246. where in trespass the *venire facias* and *habeas corpora* were *placito debiti*, and after a verdict amended. Mr. Eyre cited 2 Cro. 528. where in an issue joined upon a *scire facias* the *venire facias* was in *placito debiti*, and ill. And Holt chief justice said, that the case in *Hobart* had been held otherwise. And Mr. Eyre said, that the judge had no authority to try the cause.

Holt chief justice said, that the judge of *nisi prius*'s authority was not by the *distringas*, but by the commission of assize; for that by the statute of *nisi prius*, 13 Edw. 1. c. 30. which gives the trial by *nisi prius*, it is to be before judges of assize; and the *distringas* is only to bring the jury before them: and at first the trials by *nisi prius* were had upon the *venire facias*, and the clause of *nisi prius* is by that statute expressly ordered to be inserted in the *venire facias*. Then came the statute of 42 Edw. 3. c. 11. and ordered that no inquest but assises and deliverances of gaols should be taken by writ of *nisi prius*, nor in other manner, before that the names of all them that shall pass in the same inquests be returned into the court. And by reason of that statute trials by *nisi prius* came to be upon the *distringas*; and the intent of that statute was, that by the jury being returned of record in court, the party might have an opportunity to see the panel, and to prepare himself to make his challenges.

Jurisdiction of judges of *nisi prius*.
See 14 Edw. 3. f. 1. c. 16.

Powell justice agreed with the chief justice; only he said, that the reason of trials being had upon the *distringas* was, to prevent an inconvenience that was frequent heretofore, for the defendants to cast an *essoins* at *nisi prius*, when all things were ready for trial; for the defendants being by the statute of Marl. 52 H. 3. c. 13. to have but one *essoins* after issue joined; and upon the return of the *venire facias*, when the

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the trial was not had upon that, but that was returned above, the defendant must be essoined above, and could have no essoin below upon the *disfringas*, and so the mischief was helped.

As to the fault in the *disfringas* being aided after a verdict, the court took the difference between no *disfringas* and a bad one: in the first case it is helped, otherwise in the last. And *Powell* justice said, he knew an ill *disfringas* dropped once at the bar.

The whole court held, that the *disfringas* was amendable; and gave judgment for the plaintiff, *nisi*.

Regina vers. Smith.

S. C. Salk. 680. 1 Sess. Cal. 41. pl. 42. Writ of Error and Record post Vol. 3. p. 33.

R. acc. 11 Mod.
174. pl. 17.

A Writ of error of a judgment at the sessions for *Middlesex* at *Hickes's-hall*, upon an indictment upon the statute of usury: and Mr. *Eyre* assigned for error, that the justices at sessions had no jurisdiction of usury by the (a) statute. And upon looking into the statute, the court were of the opinion, and reversed the judgment.

(b) See also 1
Sess. Cal. 41.
pl. 42.

See for (b) the reason of this and the like cases, the case *Rex v. Alsop*, 4 Mod. 49. an indictment for shooting with a hand-gun and hail-shot, found at the sessions, and held not to lie. And *Rex v. Bugg*, an indictment found also at the sessions, for that the defendant being a cloth-worker, and not living in any city, borough, or town corporate, did yet keep in his house more than one woollen loom: 4 Mod. 379.

(a) 12 Car. c. 13:

Idle vers. Cooke.

Intr. Trin. 21
W. 3. B. R.
Rot. 253. or
823.

S. C. Salk. 620. 1 P. Wms. 70. 11 Mod. 57. Holt 164. 3 Danv. 186. pl. 14.

The surrender of a copyhold must be construed as a deed. D. acc. arg. 151. R. cont. ante 622. vide Cro. Eliz. 29. Cro. Jac. 376. 2 Bulstr. 272. A limitation in the surrender of a copyhold to the use of A. and his wife pro & durante termino vitarum suarum, & hæredum & assignatorum prædictorum A. & uxoris, & pro defectu talis exitus to the use of the right heirs of the father of A. passes an estate in fee-simple to A. and his wife.

UPON a special verdict in ejectment the case was no more than this: *Zachary Cliffe* the father, a copyholder in fee, surrendered his copyhold to the use of himself for life, and after to the use of *Valentine Cliffe* his son, and *Alice* his wife, *pro et durante termino vitarum suarum naturalium, et hæredum et assignatorum prædictorum Valentini et Aliciæ; et pro defectu talis exitus ad opus et usum rectorum hæredum prædicti Zachariæ in perpetuum*. And whether by these words an estate-tail passed to *Valentine* and *Alice*, or a fee-simple, was the question between the lessor of the plaintiff, who claimed by surrender from *Zachary*, made after the death

of *Valentine* and *Alice* without issue, and the defendant, who claimed by surrender from *Alice*, who survived *Valentine* her husband. The case was argued several times at the bar, and now this day the court delivered their opinions *seriatim*.

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Gould justice said, he had considered very well of the case, and could not bring himself to be of opinion, that it was a fee-simple, but did not take it to be an estate-tail, though in this his opinion he was so unfortunate as to differ from the rest of the judges. That which stuck most with him was the case of *Abraham* and *Twigg*, *Litt. Rep.* 287, 347. *Hutt.* 86. *Moore* 424. *Cro. Eliz.* 478. 3 *Danv.* 185. pl. 10. 7 *Co.* 40. b. but upon consideration he thought his case differed from that: that in this his opinion he had the intention of the parties of his side. He said the reason he went upon was, that those precise words of the body, were not requisite to create an estate-tail; but if there were words, that did tantamount and declare the intention of the parties, it (a) was sufficient, so those words were consistent with the rules of law. He said, he did not go at all upon any difference between a surrender of a copyhold, and a conveyance of freehold lands; for he thought they ought to have the same construction. First, he said, here was the word heirs, and that explained to be the heirs of *V.* and *A.* and being *Valentini et Aliciæ* in the genitive case, it was all one as if it had been *de Valentino et Alicia*. He said, that this was like *Beresford's* case, 7 *Co.* 40. a. where a feoffment was made to the use of *A.* for life, and after his decease to the use of *B.* and the heirs male of the said *B.* lawfully begotten; and for default of such issue the remainder over; and that was (b) held to be an estate-tail in *B.* Now there the heirs of *B.* is just the same with what this must be, if it were put into *English*; but indeed as this stands in *Latin* it is the genitive case, and if that were to be translated it might be *de B.* the words *lawfully begotten*, that are in that case, signify nothing; because every heir must be lawfully begotten. But that which makes the doubt in that case is, that it is not limited in certain of what body the heirs male should come, and therefore there ought to be something in the words to shew that. And that in *Beresford's* case is done by the words, of *B.* in *Latin*, *de dicto B.* and here by the words *Valentini et Aliciæ* in the genitive case, which is in *English* in the same manner of *Valentine* and *Alice*, the words *such issue* refer to them two. He said that *Beck's* case, *Litt. Rep.* 253, 285, 315. 344, &c. and *Cro. Car.* 363. ruled this: there a feoffment was made to the use of *A.* for life, remainder to *C.* second son of *A.* for his life, remainder to the use of the first son of *C.* which should have issue male of his body, and to his heirs for ever; and for want of such issue, remainder to the right heirs of *C.* *A.* died, leaving *B.* his son and heir; *C.* had issue *D.* a son, who died without issue; *C.* after the death of *D.* levied a fine to *E.*

(a) Acc. Co.
Litt. 20. b.
7 Co. 40. b.

(b) R. acc. 3
Lev. 70.

and

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and in ejectment by *B.* against *E.* it was resolved, that that was an estate-tail in contingency to the first son of *C.* who should have issue male; and so the remainder in fee vested in *C.* and that must have been the question; for if it had been a fee to the first son of *C.* then the remainder to the right heirs of *C.* had been void, being limited after a fee. But they held the remainder to be good, and consequently, that the estate to the first son of *C.* was an estate-tail. He said, that the case of *Abraham v. Twigg* was objected, where a limitation of an use was, *ad opus et usum Gabrielis Dormer et hæredum masculorum suorum legitime præcreatorum, et pro defectu talis exitus* the remainder over; and it was adjudged to be a fee-simple, because it was not limited of what body the issue male should issue. But to this case I answer, that our case differs from it, because in our case it is said to the use of the heirs of the said *Valentius* and *Alice*, and in that it is only *hæredum masculorum suorum*; but if it had been in that case, *hæredum masculorum dicti Gabrielis Dormer*, as our case is, it had been a fee-simple; and so it is held by *Richardson* chief justice, and the difference taken in his argument of *Beck's* case, *Litt. Rep.* 347. It is objected farther, that the word assigns alters the case, and will make it a fee-simple, because an estate-tail is not assignable. But to that I answer, that that makes no difference in the case, and therefore, where the case in *Plowd.* 541. a. out of 13 *Ric.* 2. is, that if a man make a feoffment to one to have and to hold to him and his heirs, *et si contingat* that the feoffee die without heir of his body, that then the land shall revert: this is an estate-tail. So it would have been in the same manner, though the *habendum* had been to him and his heirs and assigns; as *Cottin's* case is, 3 *Leon.* 5. where the case was, a feoffment to the use of the feoffor and his wife *pro termino vite ac etiam rectorum hæredum* of the feoffor *et assignatorum* of the feoffor after the death of the feoffor, and his wife; *et si contingat præfatum feoffatorem obire sine exitu de corpore suo præcreato*, remainder over: this was adjudged to be a good estate-tail in the feoffor, though there was the word assigns. So that upon the whole I am of opinion, that judgment ought to be given for the plaintiff.

Pouys justice for the defendant, that it is a fee-simple. To make an estate-tail it must be limited by the gift, of what body the issue male or female shall issue. So is *Litt. sect.* 31. and therefore a gift to a man and his heirs male, or to a man, and his heirs female, is (a) a fee-simple; but indeed a devise to a man and his heirs male, or to a man and his heirs female, is (b) an estate-tail; because wills are construed according to the intent of parties, which is apparent in that case, to create an intail. So is 27 *Hen.* 8. 27. where the difference is taken between such a devise by will, and a gift. *Hob.* 32. *C. L.* 27. a. There are books, as 9 *Hen.*

6. 25.

(a) D. acc. ante
186.

(b) R. acc. ante
185, and see the
books there
cited.

B. 25: 3 *Cra.* 470. that even a devise to a man and his heirs males, is a fee simple, but the other is the better opinion. But in all other cases there must be, in cases of limitations of estates-tail, either the words *de corpore*, or words equivalent: as the case of 37 *Aff.* 15. (a) a gift to a man *habendum* to him *et hæredibus suis, si hæredes de carne sua habuerit, et si nullus de carne sua habuerit, revertatur, &c.* that was adjudged to be an estate-tail. So in the statute *de donis*, two of the instances there put, have not the words *de corpore* in, but *hæredibus de ipsis viro et muliere procreatis*, which are tantamount. And where-ever the words *de corpore* are not in, there ought to be the words *de J. S.* or *ex J. S.* as 5 *Hen.* 5, 6. a gift to *R. et K. uxori ejus et hæredibus eorum, et aliis hæredibus dicti R. si dicti hæredes de R. et K. exsunt obierint sine hæredibus de se*, is an estate-tail in baron and feme. So 3 *Edw.* 3. brief 743. a (b) gift to one *et hæredibus suis de prima uxore sua*, is an estate-tail. And the difference between *de dicto Adeno*, and *hæredum suorum masculorum*, which are the words in *Abraham* and *Twigg's* case without *de*, or *hæredum Adeni*, is that which gave the turn to *Beresford's* case, and was the ground upon which the judges adjudged it to be an estate-tail. In this case the words are in *Latin* in the genitive case, there the words that were in *English* are turned into *Latin*, and made *de dicto Adeno*, to ground that construction upon, that they created an estate-tail. If the words here were, and the heirs and assigns of *Valentine* and *Alice*, then it were *Beresford's* case, but as it is, it is the very case of *Abraham v. Twigg*, which was a case adjudged upon great deliberation, only this seems to be the stronger case of a fee simple of the two. The only objection is, what could be meant by the words, *and for want of such issue*, which it may be said, must be understood of such issue of their bodies? But to this I answer, that here is a total omission of what body the issue should come of, which was the thing chiefly necessary, and therefore it is altogether uncertain what issue was meant, and such issue may as well mean issue of the survivor, as heirs is the heirs of the survivor in the precedent words, so that that is totally uncertain. This case does not come up to the case of 5 *Hen.* 5, 6. for there the words are, *hæredes de R. et K.* and *hæredibus de se*; nor are the words so strong for an estate-tail, as they are in the case of *Abraham v. Twigg*: there are the words, *hæredum masculorum suorum legitime procreatorum*: here the words are, *hæredum V. et A.* as general as can be. And there is no difference between a limitation in a surrender of a copyhold, and in a conveyance of freehold land, but there must be proper words used to create the estate. And so is the case of *Seagood v. Hone*, *W. Jon.* 342. *Cra. Car.* 366. where a copyhold was surrendered to the use of *A.* and *B.* and the longest liver of them, and for want of issue of *B.* remainder over; and resolved, that though in a devise those words would give

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(a) S. C. Co.
Litt. 21. a. Br.
Estates. pl. 61.

(b) S. C. Co.
Litt. 20. b.

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(a) Vide 13
H. 7. pl. 17.
22. Prec. Chan.
439. 452 ante
204. Burr. 2608.
1 P. Wms. 57.
and in Perk. 16
273.

an estate tail to *B.* by implication, yet it shall not be so in a surrender or conveyance, in passing which the party ought or might have had sufficient counsel to direct him; but in regard an estate for life is limited to *B.* by express limitation, it (a) shall not be an estate unto him higher by implication. It is objected, that the words of the statute *de donis* are, *quod voluntas donatoris de cetero observetur*, and here in this case it appears to have been the intent of the donor to have it an estate-tail. But the answer to this is, in those other words of the statute, *secundum formam in charta doni sui manifeste expressum*; that the intention, which is by the words of the statute to be observed, is the intention of the donor plainly expressed in his deed of gift. The case of *Harrington v. Smith*, in 2 Sid. 41. is the very case in point: there the case was a surrender of a copyhold to the use of *A.* and his wife and their heirs lawfully begotten, remainder over; and though there (b) is no mention in *Siderfin* what became of the case, yet in a manuscript report that I have, it is reported to have been adjudged a fee-simple. To construe this an estate-tail upon the intention of the parties, without any words to raise such an estate, may be of very ill consequence in altering the forms of words, that have been hitherto stuck to, and thought necessary to create an estate-tail; and to judge estates to be intails upon such loose words, will occasion a great deal of uncertainty in titles, and beget a great many disputes, and I think the judges have carried it far enough already.

Powell justice for the defendant. He said that the question was, whether this was an estate-tail, or a fee-simple: that it was objected, that it was the intent of the party, that it should be an estate-tail, and that the statute *de donis* had been taken by equity to support the intent of the parties, and he would go as far as he could to support the intent of the party, but he could not comply with it so far as to take away all distinction, and leave no difference between the forms of words necessary to create an estate-tail and a fee-simple. He said, that the sort of estate, which is now since the statute *de donis* called an estate-tail, was well known before that statute, and that the statute did not create the estate, but only preserved it: that there (c) were three sorts of estates of inheritance at common law: First, an absolute estate of inheritance to a man and his heirs: Secondly, a fee-simple qualified as to the time of its duration; as an estate to a man and his heirs as long as *J. S.* has heirs of his body, or as long as *Bow* church stands, or as long as *J. S.* lives; for in these cases, though the estate shall descend to a man's heirs, yet they shall have it for no longer time than is contained in the respective limitations: Thirdly, a fee-simple restrained as to what heirs shall inherit it. And this was called a fee-simple conditional at common law:

(c) 2 Bl. Comm.
104 Co. Litt.
1. b. 2 Inst 96.
10 Co. 97. b.
Vaugh. 273.

(d) In 2 Sid. 73. the court adjudged it to be a fee-simple.

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but that is not so to be understood, as if upon the performing the condition a fee accrued; for then it would have been the same case, as a gift for life with a condition, that if the donee did such an act, that then he should have fee, and consequently, if the tenant in fee-simple conditional had aliened before issue had, it would have been a forfeiture of his estate, which was not so. But it was only a qualification as to what sort of heirs should inherit it: but the tenant in fee-simple conditional had an estate of inheritance in him before issue had; but it was qualified as to the descent of it, to such particular heirs as were expressed in the limitation. And therefore if lands at common law were given to a man and the heirs male of his body, and he had issue two sons, and the eldest son had issue a daughter, the (a) second son should inherit, and not the daughter, because she was not within the form of the gift. But the statute *de donis* takes notice, that there had an abuse crept in before the making of that statute, in letting persons in to take, that were not within the limitation. As if lands were given to *baron* and *feme*, and the heirs of their two bodies, and the wife died, and the husband took a second wife, she was held to be dowable; so if the husband died, and the wife took a second husband, he should be tenant by the curtesy, and the issue by such second marriage should be inheritable; and the statute provides that *de cetero* it shall not be so. If then this estate, which is now called an estate-tail, was (b) a fee-simple conditional at common law, to create it there must necessarily be such words as would have been sufficient to have created a fee-simple conditional into an estate-tail, and the possibility of *reverter* into a reversion or remainder. Now let us see, if there be any thing in this case to restrain the general word heirs to any particular sort of heirs: and that there should be some words to restrain it is equally necessary in wills as well as surrenders and deeds. There is indeed this difference between wills and deeds, that as in wills the precise word heirs is not necessary to make a fee, so neither are the (c) words *de corpore* *J. S.* or *de J. S.* or *ex J. S.* &c. necessary to make an entail; but there must be something in the will, by which it must appear, that it was the intent of the deviser, that it should be an estate-tail. And therefore if a man devises his son lands to his and his heirs for ever, and for default of heirs of his son, to his daughter and her heirs for ever, which was the case of *Hearne* and *Allen*, *Cro. Car.* 57. *Hutt.* 83. that (d) is a tail, because of the manifest intent of the deviser appearing from the clause for limiting the lands over to the daughter and her heirs, for default of heirs of the son; for the son could never die without heirs in a general sense, as long as the daughter had any, and therefore heirs could be intended by the deviser nothing but issue. And there must be something in the will to restrain the generality of the word heirs to special heirs, either in express words,

(a) Acc. Litt.
l. 23. Co. Litt.
24. b.(b) Vide Co.
Litt. 20. a. 2
Bl. Com. 112.(c) R. sec. ante
185, and see the
books there
cited.(d) Vide ante
568, and the
books there
cited.
and Cro. Jac.
590.

IBLE
COOK.

words, or words that shew an apparent intent of the parties to restrain it; for we can judge of the intent of the parties only by their words, and this must be so in wills as well as deeds. And where there is no such thing, we must judge according to the generality of the words, and consequently there being no restraint to tie the words to any particular heirs in this case, we must judge it a fee-simple. The judges shewed their favour to estates-tail, and supporting the intention of the donor, in *Beresford's* case, and the reason they grounded their resolution upon in that case was, because the *English* words in that case, the heirs of the said *B.* might be translated, *haeredes de dicto B.* which words are sufficient to create an estate-tail: but here the words are in *Latin*, and therefore it is the very case of *Abraham* and *Twigg*. My brother *Gould* has endeavoured to give an answer to the case of *Abraham* and *Twigg*, but I cannot see the force of his answer; for I cannot apprehend any difference between these words, *Gabrielis Dormer et haeredum masculorum suorum*, and *Gabrielis Dormer et haeredum masculorum praedicti Gabrielis Dormer*, that is in *English*, between *G. D.* and his heirs males, and *G. D.* and the heirs males of the said *G. D.* but they are to me both the same thing. The clause, *and for default of such issue*, will not help it, because there is no limitation to any issue before, for it to relate to, for all heirs are issue of some body: if the words had been, if they shall have no issue, or for want of issue of them, that would have restrained the general word heirs to the issue of their bodies. He said, that the judges had gone too far already in supporting the intents of parties without proper words; and if they should go farther, it would introduce great uncertainty into titles of estates. He said, it was not material to the resolution in *Bick's* case, whether that limitation was an estate-tail, or a fee-simple, and that when the cause came into this court by writ of error, there was no notice taken of that point; and it was sufficient to support that resolution, that it was a contingent estate. For though it was a doubt in *Leonard Lovey's* case, whether a remainder could be limited after a contingent fee, yet it is none now. And therefore if a fee-simple be limited to such persons as *A.* shall appoint by his will, remainder over, that is a good remainder vested, till the appointment. But besides in that case, there are words for the clause *and for want of such issue* to relate to, issue male of his body going before. For though those words are indeed only a *descriptio personae*, yet they may serve for those words to relate to, and help a little. But here in this case is nothing for *such issue* to refer to, but the general word heirs, which is of no avail, because every heir must be issue of some body. *Harrington's* case is in point, but I never knew before that it was adjudged. This construction will make too much uncertainty in limitations of estates.

A remainder
may be limited
after a contin-
gent fee, vide
ante 205, and
the books there
cited.

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Holt chief justice for the defendant. He said, the question was, whether these words being in *Latin* in the surrender, do make an estate-tail: and that they could not be construed by any rule or reason of the law an estate-tail. He said, that the intention was, it should be an estate-tail, and therefore he was desirous to make it so; but he could not do it by any rule of law, but according to and in pursuance of them he must construe it to be a fee-simple. He said, that this limitation must be considered in the same manner, as if it were a deed, though it were a limitation of the uses of a surrender of a copyhold estate; for that (a) limitations of (a) *Vide a Vos.* uses, and surrenders of copyholds, must be confined to the 257. rules of the common law. He said, that according to *Littleton, sect. 31.* in all gifts in tail it must be limited of what body the issue shall come, and if that be omitted, though the gift be to a man and his heirs males, or to a man and heirs females, yet the donee has a fee-simple and not an estate-tail; but the word males in the one case, and females in the other, shall be rejected. And though the statute *de donis* says, that the will of the donor shall be observed, yet it is confined, *secundum formam in charta doni sui manifeste expressam*; and therefore in that case of a gift to a man and his heirs males, because it is not limited of what body the heirs shall come, the word males shall be rejected, though it be in the same sentence, and the lands shall go to all the heirs of the donee without distinction, though the intent of the donor was, that it should go only to the male heirs. According to this is my lord Coke in his comment upon this section, 27. b. where are these words: "It is a certain rule in law, that in every state in tail within the said statute, it must be limited either by express words or by words equivalent, of what body the heir inheritable shall issue." And being there are no words in this case to shew of what body the heirs inheritable shall issue, and there are words to make a fee-simple, this is the very case in *Litt. sect. 31.* He said, that in a will indeed this would be an estate-tail, but the reason of that was, because of the intention of the party: but in expressing a man's intention in a deed, a man must observe other methods than he need do in a will, where if he did but express his intention, it mattered not in what form he did it. For the law has appointed particular settled words to carry estates in a deed, as for instance the word heirs to pass a fee-simple, which are not necessary in a will; and the reason of this difference is, because the same law by virtue of which a man has a right to his estate rather than *J. S.* and such an estate passes by such a conveyance, has restrained and tied up that conveyance to particular set words, in which it shall be penned. But the statute of 32 Hen. 8. by which the power of devising lands by will is given, says, that all persons having socage lands, and no knight-service lands,

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(a) R. acc.
3 Bro. Cha. Caf.
147, acc. 2 Bl.
Comm. 108.

A limitation to a man and his heirs even in a deed may be so far explained as to pass an estate-tail only. R. acc. ante 101. and see the books there cited.

lands, shall have power to dispose of them by their last wills and testaments in writing, at their free will and pleasure, and so leaves them at liberty to express their wills in what words they please. And therefore, though a gift of land to a man for ever in a deed is but an estate for life, yet in a will it (a) is a fee-simple, because the intention of the deviser is plain, that the devisee should have the inheritance, and the statute has left him at liberty to use the words he thinks fit, to express his intention.

He said secondly, that there were not words sufficient to turn the estate in fee-simple limited by the first words, to the heirs of the said V. and A. into an estate-tail. If it had been, and if they die without issue of their bodies, the remainder over, there had been particular words to express what heirs the surrenderor meant, and such as were consistent with the general words preceding, and would have restrained them. And so it was in the case of 5 Hen. 5, 6. and Perkins, *set.* 171. where the cases are put, viz. if lands be given to a man and his heirs, if he have issue of his body, and if he die without heir of his body, the reversion to the donor: this is a tail. So a gift to a man *habendum sibi et hæredibus suis, si hæredes de carne sua habuerit, et si nullos hæredes de carne sua habuerit*, the reversion to the donor, is a tail also. But it is objected, that an estate-tail may be created by implication, and for that Perkins, *set.* 173. is cited; where the case is, that if land is given to J. S. *et si contingat ipsum obire sine hæredibus de corpore suo, quod tunc revertatur to the donor and his heirs*, the donee has an estate-tail, notwithstanding that it is not given to him and his heirs, because the statute of Westm. wills, *quod voluntas donatoris secundum formam in charta doni sui manifeste expressam, de cetero observatur*. I agree (b) C. L. 20. d. that case, because there the intent of the donor appears in express words in the deed, and the implication is a necessary one upon the words. But there is no such force in the words, and for default of such issue, used in this surrender, nor no such implication, for every heir is issue of some body. But the remainder limited over in this case is a fee limited after a fee, and void. As if lands were given to a bastard and his heirs, and if he died without heirs, the remainder over; though a bastard can have no heirs but of his body, yet the limitation is a fee-simple, and the remainder over is a void remainder, because it is a limitation of a fee after a fee.

Note, I apprehend this case was further urged by the chief justice to answer the objection mentioned by Popham, that there could be no heirs, that would be heirs to both husband and wife, but what must be heirs of their bodies. Note to the first edition.

He said thirdly, that there could be no implication against express words. And for that he cited the case of *Seagood v.*

(b) There is no case in Co. Litt. 20. a. to which the chief justice could advert. In Co. Litt. 20. b. a case is put of a limitation to A. and the heirs of his body, remainder to B. in *solima prædicta*, to which he might possibly allude.

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Hone, 1 Cro. 367. and therefore, there being a fee given in this case by exprefs words to the survivor of *V.* and *A.* there shall be no estate raised by implication, contrary to that exprefs limitation. He said, that he could not differ this case from the case of *Abraham v. Twigg*, which he said was a great authority, so great a one, that he could not get over it. He said, that was a case of limitation in a deed; that by the words, *haeredum masculorum suorum legitime procreatorum*, and the clause *pro defectu talis exitus*, it plainly appeared what heirs the party meant, and yet that was resolved to be an estate in fee-simple contrary to the apparent intent of the parties, and the strong implication upon the words of the limitation, for want of complying with *Lyttleton's* and *Coke's* rule, and shewing of what body the heirs should issue. My brother *Gould* says, that there is no difference between the genitive case and the ablative, between *haeredum suorum*, and *de se*. But there is a very great one; for *de* is the word made use of in the statute *de donis*, and *ex* and *de* import a man's body. And if you were to translate this *English*, the heirs of *John*, into *Latin*, it would not be proper to translate it by the genitive case, *haeredes Johannis*, but *haeredes de Johanne*; so heirs of him, not *haeredes ejus*, but *haeredes de ipso*; so son of such a father, not *natus or filius talis patris*, but *natus or filius de tali patre*. And therefore when, as it was in *Beresford's* case, a limitation is in *English* to the use of *B.* and the heirs male of the said *B.* lawfully begotten, and for default of such issue, the remainder over, that must be translated into *Latin* according to the subject matter, *de dicto B.* He said, the words *de corpore* were not necessary, but that words tantamount were sufficient: as a gift to a man *et haeredibus de carne sua*, or *de se*, or to a man and his heirs, which he shall beget of his wife, are estates-tail. And so is *Ca. L. 20. b.* He said, that if in the case of *Abraham* and *Twigg* the words had been, the heirs males of *Gabriel Dormer*, in *English*, instead of, his heirs males, or *haeredum masculorum suorum*, that had been an estate-tail; and that is the difference taken in *Beresford's* case. As to *Beck's* case, there the words, *and for want of such issue*, refer to the words *issue male of his body* before. For what must such issue be, but such as is mentioned before.

He said fourthly, that to make this an estate-tail, would be a construction repugnant to the premises; for the limitation is not only to the heirs of *V.* and *A.* but also to their assigns, and that word is very considerable in the case; for it shews, that the surrenderor intended, that *V.* and *A.* should have an assignable estate; and therefore to construe it an estate-tail is to give *V.* and *A.* an estate that is not assignable (for it is the very essence of an estate-tail not to be assignable, the words of the statute *de donis* being, *quod the donees non habeant potestatem alienandi*) and consequently is a construction contrary to the first part of the limitation by

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Expressing what
would otherwise
be implied tho'
it cannot affect
the clause in
which it is in-
serted, may con-
trol a subsequent
one. Vide ante
568. *Gr. Jay.*
595.

which the estate is expressly limited to the heirs and assigns of *V.* and *A.* if having, and not having, a power of assigning, are contraries. But to this I foresee it will be answered, that the word assigns is only a consequence in law upon the nature of the estate, and is void, according to that maxim, *expressio eorum quae tacite insunt nihil operatur*. But to that he said, that that maxim must be understood, that it will have no operation upon the same clause wherein it is expressed, but it may control a subsequent clause: and therefore a man may make a lease with a condition, that the lessee shall not alien, but if he make a lease to the lessee and his assigns with such a condition, the condition is void; and yet leasing it to the lessee and his assigns, was no more than what the law implied. So the case in *Dier* 265. a lease of a house passes the shops, and yet if a man leases a house with the shops by express name, and after excepts the shops, that exception is void. And for these cases he cited *Hob.* 170. So here, though the limitation to a man, his heirs and assigns, is of no greater effect than a limitation to a man and his heirs, yet it may have that effect as to prevent the subsequent clause, *and for want of such issue*, from making it an estate-tail contrary to the express limitation before; whereby an assignable estate was limited to *V.* and *A.* He concluded, that though the intent of the party ought to be regarded, yet so ought also the rules of law, and that especially in a case of a conveyance in a man's life-time, and that of an estate, to the creating of which the law required a particular form of words, or words that did tantamount.

Judgment was given for the defendant,

Kempe *vers.* Goodall.

S. C. Salk. 277.

In debt for rent
if the plaintiff
declares upon a
demise by inden-
ture, a plea of
nihil habuit in
tenementis is
bad. R. acc.
3 Lev. 146. post
1550.

And the plain-
tiff may demur
to it. R. acc.
3 Lev. 146. post 1550.

A party need not plead an estoppel which appears upon the record, but may avail himself of it without, R. acc. 3 Lev. 146. post 1550.

IN an action of debt for rent the plaintiff declared upon a demise by indenture, &c. The defendant pleaded *nihil habuit in tenementis tempore dimissionis praedictae*. And the plaintiff demurred generally. Mr. Salkeld for the defendant said, that he did not pretend that *nihil habuit in tenementis* could be pleaded contrary to the estoppel by acceptance of the lease by indenture, but that the plaintiff for want of replying, and relying upon the estoppel, had lost the benefit of it. For instead of demurring, he should have replied and prayed judgment, if the defendant, contrary to his own acceptance of a lease of this land by indenture, should be admitted to plead this plea. And he compared it to the case of *Speak v. Richards*, *Hob.* 206, where in an action of debt

against

against the sheriff for money levied upon a *levari facias*, the plaintiff in his declaration set out the recognizance and all the proceedings upon it and the *levari facias*, and that upon it the defendant levied the money, and at the return of the writ returned, that he had levied it, *quos paratos habeo, &c.* the defendant pleaded as to part *nil debet*, and to the residue payment and an acquittance before the day of the return of the writ. And though it was objected, that these pleas were directly contrary to the defendant's return upon record, yet the court held, that in regard the plaintiff had joined issue upon the *nil debet*, and demurred to the plea of payment and the acquittance, and had not relied upon the *estoppel* the pleas were made good.

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The whole court held this to be no plea, because it appeared upon the declaration to be a demise by indenture, and so the *estoppel* appeared upon record, and so there was no need of replying it; otherwise where a man declares *quod cum demisit* generally. And Powell said, that all the books were to the contrary. And Holt chief justice said, that in that case in *Hob.* they did not set out the return in the declaration with a *prout patet per recordum*, and therefore the levying the money was the ground of the action, and not the return; but if a man should bring debt upon a judgment, and in his declaration set out the judgment, *prout patet per recordum*, the (a) defendant could not plead payment. Judgment was given for the plaintiff, *nisi*.

(a) Sed nunc
vide 4 Ann.
c. 16. s. 12.

Glover *vers.* Rogers.

S. C. Salk. 557.

Intr. Hil. 3
Ann. B. R.
Rot. 345.

A Writ of error of a judgment in the common pleas, in an action upon the case, wherein the plaintiff declared, that the defendant in consideration the plaintiff's testator transportasset for the defendant from such a port to such a port such and such merchandizes, promised to pay the plaintiff's testator *tantam denariorum summam pro transportatione merchandizarum prædictarum rationabiliter habere meruisset*, and avers, that *pro transportatione merchandizarum* he had deserved so much, &c. Upon *non assumpsit* pleaded there was a verdict for the plaintiff. Sir James Mountague for the plaintiff in error took these exceptions: first, that it was only *tantam denariorum summam*, and not said *quantam*: secondly, that it was *tantam denariorum summam pro*, &c. *rationabiliter habere meruisset*, and not said *who*: thirdly, that the averment was only *pro transportatione merchandizarum* he had deserved so much, and not said of these; where-
tione merchandizarum, omitting the word "*prædictarum*" he deserved so much, cannot be objected to after verdict.

A count stating that in consideration the plaintiff's testator had carried certain merchandizes for the defendant, and the defendant promised to pay him *tantam denariorum summam pro transportatione merchandizarum prædictarum rationabiliter habere meruisset*, omitting the words, "*quantum ipse*," and averring that *pro transportatione*

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v.
ROBERTS.

as if they were others, it made nothing to this cause of action.

But the court over-ruled all the exceptions, and after the cause was twice on in the paper, affirmed the judgment. And first, as for the leaving out *quantum*, they said *tantum* imported enough alone, viz. that the defendant promised to pay so much the plaintiff had deserved. As to the second, they said, *meruisse* was he deserved; and if it had been *ipse meruisse*, that must have related to the person that transported the goods, especially that being the ground of the action: and therefore *meruisse* signifying as much as *ipse meruisse*, would be well. And Powell said, there were but two persons in the declaration, and therefore it (*a*) could be no body but the transporter, and so was good within that difference. As to the third, they said, that if the transporter had not transported these merchandizes, the plaintiff could never have had a verdict, and therefore now after a verdict the want of *praedict*, was helped. And Gould justice said, that Twissden justice used to call a verdict omnipotent.

(a) Vide ante
899.

Smith et alii *vers.* Stoneard.

S. C. Salk. 267. Holt 274.

Vide 1 Barnard
B. R. 259.

A Writ of error of a judgment in the common pleas after a verdict. The plaintiff in error assigned for error want of an original, but did not take out a *certiorari*, as the course is, and get the want of the original certified: the defendant in error pleaded, *in nullo est erratum*. And now when the cause came on in the paper it was objected, that there ought to have been a *certiorari* taken out, and a certificate made of the error; for it might be that there was an ill original, and if that were returned, the plaintiff in error might take advantage of it, and that would not be helped by the verdict, though the want of the original were.

Holt chief justice. If the want of an original be assigned for error, and the plaintiff in error does not take out a *certiorari*, and get a return to it, and the want of an original certified; the course is for the defendant in error to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari*; and if he does not get it done, as is ordered by the rule, the assignment of error stands for nothing. But if the defendant in error will come in *gratis* and confess the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad original, &c., that is another sort of error, and when the want of an original is assigned for error, the court will never intend, that there is a bad original. And the judgment was affirmed.

Regina *vers.* West.

THE defendant was adjudged by two justices to be the reputed father of a bastard-child, pursuant to the 18 Eliz. c. 3. and ordered to pay, &c. and upon appeal to the sessions in *Hertfordshire* the order was confirmed, and for not paying of the money ordered, the defendant was committed, and was now brought into court upon a *habeas corpus*; and several exceptions were taken to the order of the two justices, and after they had been several times stirred, Mr. King took an exception to the return of the *habeas corpus*, that this was not a sufficient cause of commitment, but that in case of refusal to obey the order, the justices ought to have proceeded against the defendant upon his recognisance, which is the method prescribed by the statute, the words of which are, "that every person making default in not performing the order of the two justices, shall be committed to ward to the common gaol, there to remain without bail or mainprize, except they shall put in sufficient surety to perform the said order, or else personally to appear at the next general sessions of the peace to be holden in that county where such order shall be taken; and also to abide such order, as the said justices of the peace, or the major part of them, then and there shall take in that behalf (if they then and there shall take any) and that if at the said sessions the said justices shall take no other order, then to abide the order before made." So that the two justices only have the power to commit, if the party refuse to give security; but the sessions have no power to commit; but in case the person will not perform their order, they must go against his security. And for this reason in the like case between the king and *Hammond*, 2 *Bulstr.* 341. where the defendant was committed at the sessions, after a bond given to the two justices, pursuant to the statute, he was discharged.

The sessions cannot commit a man for disobeying an order of filiation and maintenance made by two justices. S. C. 11 Mod. 59.

Tho' such order was confirmed at the sessions. S. C. 11 Mod. 59.

Tho' a man is improperly committed for disobeying a justice's order, if the order is removed into B. R. the court of B. R. will on discharging him oblige him to enter into a recognisance for his appearance in B. R. until the validity of the order shall be ascertained.

Holt chief justice. Where the sessions proceed by way of appeal, it is by virtue of the power given them by the 18 Eliz. and by that statute they have no power to commit, but the provision that is made by that statute, to compel the party's obedience to their orders, is by a recognisance, which is to be taken by the two justices that made the order; and if the party will not give such a recognisance, they have power to commit him. Indeed if the sessions proceed originally by 3 Car. 1. c. 4. they may commit for not performing their order. And he said, it was not material in this case, whether the two justices had taken any recognisance of *West* or no (which Mr. *Eyre* objected did not appear to have

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have been done, and so would distinguish this from *Hammond's* case;) for if they had not done it, it was a neglect in them; but the sessions would not thereby have a power to commit, when no such power is given them by the statute.

Powell justice. The two justices' power to commit is only conditional, except the party put in sufficient security, &c. as by the act.

Upon this exception, the defendant was discharged; and as to the order, *curia advisare* till next term, and *West* was bound by recognisance to appear in the king's bench the first day of next term. *Vide post* 1197.

Startup *vers.* Dodderidge.

A custom to pay two shillings in the pound of the true improved yearly rent of land in lieu of the tithes of it, is void. *S. C. Salk. 637. R. acc. ante 696. 12 Mod. 563. Sed vide Hob. 392.*
And so is a custom to pay a proportion of the true improved yearly value.
A suggestion for a prohibition to a suit for tithes on account of a modus, need not shew a compliance, or an offer to comply with the modus.

MR. *Broderick* moved for a prohibition to a suit in the ecclesiastical court for tithes, upon this suggestion, *quod a tempore cujus, &c. habebatur talis antiquus usus et consuetudo de modo decimandi de et pro omnibus decimis quibuscunque infra parochiam de W. et finis, limites, et loca decimabilia ejusdem quoquo modo crescentibus, renovantibus, sive contingentibus, viz. quod omnes et singuli proprietarii, agrum firmarii, vel occupatores aliquarum terrarum vel tenementorum infra parochiam de W. prædictam, &c. per totum tempus prædictum annuatim solverunt, et solvere consueverunt, rectori ecclesie parochialis de W. prædictæ firmario sive deputato rectoriae illius pro tempore existentis upon request secundum ratum 2s. legalis monetae Angliæ pro qualibet et utraque libra veri adausi annualis redditus vel valoris, Angliæ, of the true improved yearly rent or value, respectuorum terrarum et tenementorum infra parochiam de Whittington prædictam, &c. et non ultra, in nomine, loco, ac in plena satisfactione, omnium et singularum decimarum quarumcunque annuatim crescentium, &c. in vel super respectiva terras et tenementa sua infra parochiam de W. prædictam, &c. which the several rectors, &c. have time out of mind accepted in full satisfaction, &c. of all tithes, and the custom aforesaid inviolably observed; yet the defendant knowing the premises, has sued the plaintiff in court *Christian* for subtraction and non-payment of tithes of hay and wheat in and upon the lands and tenements aforesaid, in the tenure and occupation of the plaintiff, being in the year of our Lord 1696, growing, &c. and supposed by him to be subtracted and taken away, licet the plaintiff, &c. And a rule was made for the defendant to shew cause, why a prohibition should not be granted. And now Mr. *Pengelly* moved, that the rule might be discharged. He said, this modus was not good for the uncertainty, for the yearly rent or value is variable and utterly uncertain, and may change every*

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every year; but a *modus*, which is against common right, and goes in destruction of the original right of the parson to take his tithes *in specie*, ought to give the parson a certain recompence for a certain duty, and otherwise the court cannot adjudge that it is suitable. And he cited the case of *Perry v. Soame*, *Cro. Eliz.* 139. where, in a suit in the spiritual court for tithes of herbage of dry cattle, the defendant surmised for a prohibition, that every parishioner there, which had milch kine and calves under the number of seven, shall pay for every calf he rears a halfpenny, for every one he kills a penny, and for every one he sells the tenth penny; and if he has seven or above, to give one in satisfaction of tithes of them, and of all dry cattle. And they held this to be an ill *modus*, because if the parishioner had only dry cattle, and no calves, he pays nothing, and it is uncertain, whether he shall have calves or not, and so it is an uncertain thing for a certain duty. And *Allen's case*, 2 *Roll.* 265. d. p. 2. a prescription to pay one penny, or thereabouts, for every acre of arable land, in lieu of tithes, naught for the uncertainty. And 1 *Keb.* 612. *Took v. Ledgard*, a *modus* to pay 4 s. for every day's ploughing of wheat, and 2 s. for every day's ploughing of barley, is not good for the uncertainty; but if the *modus* had been, so much for every day's work, with an averment that it is certainly known, and the contents of it, it might be. And a note on the side of Dr. *Leyfield's case* in *Hob.* 11. where the principal case was, a libel for tithes of stables, suggesting a prescription time out of mind for the parsons to have a *modus decimandi* for the houses, stables, and buildings, viz. after the rate of the tenth part of the yearly rent or value of the same, and a prohibition was granted in the case, with directions to declare. And on the side of that case is this note, viz. that *modus decimandi* can hardly stand to rise and fall according to the rent by prescription. And though such a *modus* be allowed to be good in Dr. *Grant's case*, 11 *Co.* 15. b. yet that case is made a question in 1 *Roll.* 642. n. 1. and the authority of Dr. *Leyfield's case* opposed to it. Secondly, this *modus* is void, because it gives room to the parishioner to defraud the parson, for it is in the power of the parishioner to take a great fine, and reserve a small rent, and so the parson shall have nothing. For the custom is to pay 2 s. per pound *veri adaucti annualis redditus vel valoris, Anglice*, of the true improved yearly rent or value, *respectivorum terrarum et tenementorum*; also the parson cannot come to the certain knowledge, what rent was reserved. And he cited the case of *Wilson v. le Evesque de Carlisle*, *Hob.* 107. 1 *Roll. Abr.* 647. pl. 5. 2 *Danv.* 601. pl. 5. a *modus* for tithe wool, that if the parishioner had under ten fleeces, that he should pay one penny to the parson for each, in lieu of tithes; and if he had more, that he should deliver to the parson the tenth part of his wool, upon his conscience, without fraud or covin, *sine visu vel tactu*

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factu of the parson; and held to be ill, because it lays the parson open to be defrauded. And my lord *Hobart*, in his report of the case, says; that it is a weak answer to say, that if it be not a just tenth, the parson may refuse it, and sue for his due: for first, he hath no means to be assured whether it be true or not, so his suit may be causeless; sure he may be it may be fruitless. *Hob. 107. 1 Roll. 647, 648. p. 5.* Secondly, the suggestion in this case is not sufficient, because it is not averred, what was the value of the land, nor what rent was paid for it, as it ought to have been; for it is only said, *licet* the plaintiff *obtulit et paratus fuit et existit ad solvendum prædictam ratam 2 s. pro qualibet et utraque libra veri adæucti annualis redditus vel valoris terrarum et tenementorum prædictorum, &c.* without saying how much that was, or what sum was tendered; and for this the suggestion is ill. For in every suggestion of a *modus*, the party ought to aver the performance of the consideration; or something which tantamounts; and so bring his case within the compass of the custom, by averring that he has done as the custom requires. And for that he cited *1 Roll. Rep. 38, 39. 62. Cro. Eliz. 139.* Note, the case in *Rolle* is against the objection, and takes the distinction, where the *modus* extends to such of the parishioners as keep cows; &c. there the plaintiff must shew, that he keeps cows; but where the *modus* is to pay money, &c. in lieu of tithes; there the plaintiff need not allege payment, &c. because it is a good ground for a prohibition, that the parson sues for tithes in kind; whereas a *modus* ought only to be paid, and not tithes in kind, and consequently the parson ought to sue for the *modus*. *1 Roll. Rep. 63. S. C.* And the case of *Croke Eliz. 139.* well understood, turns upon the same distinction.

Mr. serjeant *Bradrick* said, that the value of land was certain enough, and made the *modus* certain enough, according to the rule, *id certum est quod certum reddi potest*; that the value of land was such a certainty as the law took notice of, and therefore where a man demised a chamber, paying for it yearly so much as it should be reasonably worth, debt was brought for the rent, with an averment that the lessee held the chamber from such a time to such a time, and that for that time it was reasonably worth so much. *Stiles 397. Farmer and Lawrence.* And in powers in settlements for tenants for life to make leases, it is a common *proviso*, that the best improved rent, that may be reasonably had for the same, be reserved. And *Cro. Jac. 671. Page's case*, it was held to be a good custom of a manor, that the land was demisable for twenty-one years, paying three years value. So *2 Leon. 117.* a tenure was by the service *solvendi post quamlibet vacationem fixæ alienationem* the value of the annual profits of the lands. So is the case of *Titus v. Perkins, 3 Mod. 132.* the custom of a copyhold manor was for the tenant, upon admittance

tance to pay to the lord for a fine, *tantam denariorum summam quantum* the tenements *valebant per annum tempore talis admissionis*; and adjudged by the common pleas, and affirmed upon a writ of error in the king's bench, to (a) be a good custom, because it is certain enough, and issuable, and triable by the country, if it be of such a yearly value or not. 3 Lev. 255. 3 Mod. 132. And that, as it is certain enough, so of consequence it is well enough known. He said, that the principal case of Dr. *Leyfield* was for him; and that as to the marginal notes, they were not to be regarded, being added as he supposed by the editor of the book, but were not my lord *Hobart's*, many of them being of matters which happened after his death. He said, that Dr. *Grant's* case was in point, where the case was, a libel by Dr. *Grant* in the spiritual court alleged a custom for every parishioner, &c. occupying, &c. a mansion-house, &c. to pay quarterly *nomine et loco decimarum suarum juxta ratam cujuslibet 20 s. rent per annum ex qualibet hujusmodi domo, &c. 2s.* and upon a suggestion of a discharge by the 31 Hen. 8. a prohibition was granted, and upon traverse of the suggestion, there was a verdict for *Grant*, and upon motion by *Grant* for a consultation, it was opposed, because the custom was against common right, no tithes being to be paid for houses, and therefore void. But a consultation was granted, because this might have a lawful commencement; for this *modus decimandi* might have been paid time out of mind for all the tithes of the land, upon which the houses were built, and the lands being built after would not take away the right of the parson. 11 Co. 15. b. He said, that though according to this *modus* the parson might have more one year, and less another, yet that would not make it void; and for that he compared it to the case in Co. Litt. 96. a. a tenure to shear all the sheep depasturing within the lord's manor, that is certain enough, although the lord hath sometimes a greater number there and sometimes a less, being referred to the manor, which is certain.

Holt chief justice was of opinion upon the first stirring this case, that the *modus* was not good; and that upon the face of it, it appeared plainly to be nothing but an agreement between the parson and the parishioners. If it were an ancient composition with the consent of the patron and ordinary, before the 13 Eliz. c. 10. that would bind the parson; but then that was no ground for a prohibition, being it might be pleaded and tried below in the ecclesiastical court. That there had been formerly prohibitions granted upon suggestions of compositions, and that there were old cases to that purpose, but that it had been held otherwise since; which *Powell* agreed. But if it were a composition made since 13 Eliz. it (b) was void. He said, that a composition time out of mind was a *modus*. Taking it to be a *modus*, it would be hard to maintain it

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(a) Semb. acc.
Doug. 696.

No prohibition to be granted on old compositions, but they ought to be pleaded below.

(b) Vide 1 Bl. Com. 29.

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(a) Acc. ante
241.

to be good; taking it as to the yearly rent, it could not be good, because the land might be unlet, and then no tithes would be paid; or it might be let at an under-rent with a fine, and then the parson would be cheated. And as to the value, in case the lands should be unlet, who should determine what that was. He said, that if the *modus* were void, it was in vain to grant a prohibition to try it, because, though it should be found for the plaintiff, yet the (a) court must grant a consultation. And to that purpose he remembered the case of *Dix v. Woodson* adjudged *Hil. 8 Will. 3. B. R. ante 137.* where a prohibition was granted upon a suggestion of a custom within the hundred of *D.* to pay no tithes for agistment of barren cattle, and in a declaration upon the prohibition issue was joined upon the custom, and found for the plaintiff, and notwithstanding, because the custom was void in law, a consultation was awarded. And he remembered the distinctions taken in that case, about a custom *in non decimando*. He said, that *Dr. Leyfield's* case was a full case against the *modus*, for that the parson might sue in the spiritual court for the customary duty; which the rest of the judges agreed. As to the exception to the suggestion, he said, it was well enough, for it was enough for the plaintiff that came for the prohibition to bar the defendant of his suit in the court below, which is sufficiently done by the suggestion of this *modus*, if it be good; for then the parson ought not to sue for tithes in kind, but for the *modus*. But the last time the case was stirred, after hearing Mr. serjeant *Broderick*, he was for granting a prohibition, and putting the plaintiff to declare, and the defendant might demur, and the point be determined judicially. I did not well hear his reasons, but I apprehended them to be, because the value of land was a thing well known, and consequently certain enough: that if such a composition had been made before 13 *Eliz.* and confirmed, it would have bound the successors: that as the parsons might by custom have tithes of things, of which they had no right to have any by the common law, as fish, &c. so custom might model or restrain their tithes, or alter them.

(b) Vide 2 Bl.
Com. 30.
Bl. 421.

But the other three judges were against granting a prohibition, because this was a void *modus*, being an (b) uncertain recompence for a certain duty. And therefore, though it might be certain enough for a tenure or contract, yet it was not so certain, as that in consideration of that, they could adjudge the parson ought to be barred of his tithes in kind. Also they thought this unreasonable, because the *quantum* of the rent was not in the conscience of the parson, and so he could not know what to demand or sue for, and was exposed to be cheated; and for the value of the land, they thought it unreasonable, that the parson should be put under a necessity every year of trying that, upon any difference between him and his parishioners, upon the

the peril of costs. They said, that it was plain this was an agreement between the parishioners and some of their former parsons, and now they had a mind to turn this into a *modus*; but that it could not be.

Powell justice said, there was no case like this in the law, where a prohibition had been granted upon such an uncertain *modus*. *Pouys* justice said, that the *modus* was too high, viz. two shillings in the pound, and that while he sat in the exchequer, if (a) a *modus* were high, they always disallowed it; your ancient *modus*'s being very low, one penny, or two pence, &c. And the rule to shew cause was discharged by the three judges against the chief justice. The same motion was made in the common pleas in *Trinity* term following by serjeant *Weld*, and opposed by serjeant *Parker*. And the chief justice, and *Nruill*, and *Blencowe* held the *modus* void; but *Tracy* gave no opinion, it not being necessary. And in a case by *English* bill in the exchequer between the same parties, the *modus* was decreed to be void by all the barons. In consideration of which judgments in the king's bench and exchequer, the three judges of the common pleas said, they would not have granted a prohibition, though they had not thought it so clearly a void *modus*. *Ex relations m'ri Pengelly*.

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(a) Vide Bond.
10. Bl. 420.
2 Ves. 514.
Bl. 1257.
2 Bl. Com. 30.

Regina v. Wigg.

THE defendant was indicted for keeping of hogs here in town, in some of the back streets, *contra formam statuti*. And Mr. *Whitaker* moved to quash the indictment, because by the 2 W. & M. sess. 2. c. 8. s. 20. there was a particular penalty appointed for this offence, viz. forfeiture of the swine to the use of the poor of the parish where they are kept, and therefore an indictment would not lie, at least not upon the statute as this was, by concluding *contra formam statuti*. And he cited the case of the *King and Watson*, Salt. 45. 3 Salt. 26. where it was adjudged, that an indictment would not lie for keeping an alehouse without licence, because there is a particular penalty appointed by act of parliament.

Holt and the court agreed the case of the *King and Watson*, because (a) the keeping an alehouse without licence was no offence at common law; and they took the difference, where a new penalty is appointed by act of parliament for a matter that was an offence at common law, there you may either take that remedy which is given by the act of parliament, or proceed by way of indictment as you might have done before: and therefore keeping of swine in the city, &c. being a nuisance at common law, the prosecutor is at liberty either to proceed by way of indictment for the nuisance, or to take that more expeditious remedy, which is given him by the act of parliament, by sale of the swine.

A man may be indicted for what was an offence at common law, notwithstanding a statute may inflict a new penalty upon it, and prescribe another mode of proceeding for such penalty. D. sec. Burr. 803, 805, 834.

In such indictment a conclusion *contra formam statuti* shall be considered as surplusage. Vide ante 150.

The court will never quash an indictment for a nuisance.

(a) Vide ante 347. and the books there cited.

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Wigg.

But where the statute makes the offence there you must pursue that. As to the *contra formam statuti*, the offence being an offence at common law, that was but surplusage, and would do no harm. But besides they said, that if the defendant had any hopes in his exception, he should demur; for that it was a rule, never to quash indictments for nufances. (a).

(a) The defendant did afterwards demur; and the court gave judgment for the queen. Salk. 460.

Thornborow *vers.* Whitacre.

If a man undertake for a valuable consideration to do what is impossible, an action will lie against him for non-performance.

Under a promise to deliver a particular quantity of goods on one Monday, double the next, and *progressu sic deliberare quolibet alio die Lunæ successive infra annum bis tot quot die Lunæ proximo præcedente respectiva deliberanda forent*, the party is only bound to a delivery every other Monday after the second.

ACTION upon the case, in which the plaintiff declares upon an agreement between the plaintiff and defendant, that the defendant in consideration of 2 s. 6 d. in hand paid, and of 4 l. 17 s. 6 d. to be paid upon the defendant's performing the agreement of his part, *deliberaret* to the plaintiff two grains of rye corn on Monday the 20th of March, and four grains of rye corn on Monday then next following, and eight grains of rye corn on Monday next after the Monday last mentioned, and sixteen grains of rye corn on Monday next after the said third Monday, and double the number of grains of rye corn, *viz.* thirty-two grains of rye corn on Monday next after, being the fifth Monday, *et progressu sic deliberaret quolibet alio die Lunæ successive infra unum annum ab eodem 29 Martii bis tot grana secalis quot die Lunæ proximo præcedente respectiva deliberanda forent*, &c. the defendant demurs to the declaration.

annum bis tot quot die Lunæ proximo præcedente respectiva deliberanda forent, the party is only bound to a delivery every other Monday after the second.

Mr. Salkeld to maintain the demurrer said, that the agreement appeared upon the face of it to be impossible, the rye to be delivered amounting to such a quantity, as all the rye in the world was not so much, and being impossible was void, and the defendant not bound to perform it. He said, that there were three sorts of impossibilities; *impossibilitas legis*, such are all immoral actions, as to murder &c. Secondly, *impossibilitas rei*, such as are all natural impossibilities, which cannot be done from the nature of the thing; Thirdly, *impossibilitas facti*, *viz.* such an impossibility, as though there is nothing in the nature of it impossible to be done, yet it is impossible for a man to do, as to touch the heavens, or go to Rome in a day. And a covenant or condition to do any of these impossibilities is void. And he mentioned the case in *Litt. sect. 129.* that though relief be by law to be paid immediately upon the death of the tenant, yet if the relief be a rose, or a bushel of roses, if the tenant die in winter, the lord shall not distrain for his relief, till the season that roses come; because *lex non cogit ad impossibilia*; and the law takes notice that roses cannot be kept,

If a man undertake for a valuable consideration to deliver two grains of rye, and double it in arithmetical progression 30 or 50 times, an action will lie against him for non-performance. S. C. 6 Mod. 305. 3 Salk. 97. Vide 1 Vent. 269. 1 Will. 291. (a)

(a) The quantity doubled 30 times would be 125 quarters, fifty two, 524,288,000.

but otherwise of wheat, &c. which may. Note also, these other cases 40 *Edw. 3. 6. a. per Finchden*: if a man be bound by his deed to do things which cannot be done by impossibility (although it was his folly) yet the deed is void; but a man is liable to do as far as can be done by the power of a man. And the principal case there, which is also cited 1 *Co. 98. a.* and abridged *Fitz. Cov. 16.* and is put in *Perkins, sect. 738.* that if a lease be made of a wood, and the lessee covenants to leave the wood in as good plight as it was at the time of the lease made, and during the term the wood is blown down by a sudden tempest, the lessor shall not have an action of covenant: otherwise in case of a like covenant upon a lease of a house, and the house is blown down by a tempest during the term. For in the last case it is in the lessee's power to have the house in as good plight as it was at the time of the demise; and for that reason, though it was blown down by a tempest, yet (a) the lessee must rebuild it, because it was his own agreement: but in the first case it is impossible, because the lessee cannot make the trees grow again as they were before; and therefore by reason of the impossibility, he is excused from his covenant. *C. L. 206. b.* a bond, condition that if the obligee go from *Westminster* to *Rome* within three hours, that the bond shall be void, the bond is absolute, and the condition void. So of a feoffment with the like condition.

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WHITACRE.

(a) Acc. Dyer.
33. a. pl. 10.
Vide Al. 26.
post 1477. Com.
627. 1. T. R.
310.

Holt chief justice. Suppose *A.* for money paid him by *B.* will undertake to do an impossible thing, shall not an action lie against him for not performing it; as in case of a bond with such an impossible condition, the bond is single. So where a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages.

And as to the impossibility the court said it was only impossible with respect to the defendant's ability, which was not such an impossibility as would make the contract void. And the chief justice said, the words, *quolibet alio die Lunæ*, must be construed what we say in *English*, every other *Monday*, that is, every next *Monday* but one, and that would bring the contract nearer to the defendant's ability of performance. And he said, that *impossibilitas rei et facti* were all one.

Powell said, that though the contract was a foolish one, yet it would hold in law, and that the defendant ought to pay something for his folly.

Upon this occasion the case in 1 *Lev. 111. 1 Keb. 569. James v. Morgan*, was remembered, which was an agreement to pay for a horse a barley corn a nail, for every nail

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WHITAKER.

(a) Vide 1 Vent.
269. 1 Will.
295.

in the horse's shoes, and double every nail, which came to 500 quarters of barley; and at a trial before *Hide* chief justice the jury gave the plaintiff the (a) value of the horse in damages, and he had his judgment: which case was admitted of all hands to be good law, and did, as the counsel for the plaintiff urged, rule this. But Mr. *Salkeld* said, that differed from this, because that was possible to be performed, though it was an ill bargain, but this impossible.

The counsel for the defendant perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his cost, which was accepted of, and so no judgment was given in the case.

Kinsman *vers.* Crooke.

IN a trial at bar *May 14, 1705.* of an issue directed out of chancery, to try if a lease was made in pursuance of a power which was to make leases for the best rent that could be got: a witness named *Rushley* was examined in chancery concerning the value of the land, having been collector of the rents; and at the time of his examination in chancery he referred to and consulted his rental. But now at this trial he was become blind, and therefore his examination in chancery and depositions there were admitted to be read; because if he had been so ill as that he could not have come to the trial, they had been good evidence, and now he is disabled to consult the rental by the act of God, and therefore the same reason holds. He also gave evidence of what he remembered besides.

Secondly, 6000 *l.* was devised to *A.* and *B.* in trust to purchase lands to be settled on *Francis Goston* for life, with remainder to his sons in tail in contingency, remainder to *William Goston* for life, with contingent remainder to his sons in tail, remainder to *Harold Kinsman* in fee, with power to make leases, *ut supra*, &c. *Francis Goston* made a lease to *Crooke*, rendring 170 *l.* *per annum* rent, and died; and the question was, whether the value was 170 *l.* *per annum* at the time of the purchase or not. My lord *Gorges* and Mr. *Latin* the trustees, were produced as witnesses to prove it. And it was objected, that they were not witnesses, because *Kinsman* the remainder-man not joining in the purchase, and who now contested the lease, if the lands were not of that value, it would be a breach of trust in the trustees, and they would be liable in chancery to make satisfaction to the *cestui que trust*, and therefore they were to give evidence to excuse themselves. *Sed non allocatur per curiam*, and they were sworn and gave evidence. (a)

(a) Vide 1 R. Williams 287.

Dougl. 134. 1 T. R. 301. 3 T. R. 34. 36, 37.

Trinity Term

4 Annæ Reginae, B. R. 1705.

Regina vers. Best,

Pleadings post vol. 3. p. 37.

Indictment. That the defendant and three others, *existentes personae malorum nominum, &c. et compassantes devisantes et inter se conspirantes* how to cheat the queen's subjects of their money, &c. 18 of December, the second year of the queen, *falso illicite nequiter et astute machinantes intendentes et inter se conspirantes quendam P. P. non solum de pecuniis suis decipere et defraudare, verum etiam ipsum P. P. de bono nomine fama statu et credentia suis deprivare, et eundem P. in maximum scandalum, contemptum, et infamiam, apud omnes ligeos et subditos of the queen inducere, the said day apud London, viz. such a parish and ward, falso, illicite, deceptivo, malitiose, et ex iniqui lucri causa inter se conspiraverunt, machinaverunt, consultaverunt, et agreeaverunt, falso, injuste, nequiter, et diaboli ad onerandum et accusandum praedictum P. esse patrem infantis, unde praedicta E. E. one of the defendants tunc gravida fuit: et illi adtunc et ibidem praetendebant, et conspiratione inter se sic ut praesertur praehabita; adtunc et ibidem vi et armis, &c. falso et malitiose affirmabant, et quilibet eorum adtunc et ibidem affirmabat falso et malitiose, quod idem P. tunc nuper praesentia habuisset carnalem cognitionem corporis ipsius praesentis Eliz. E. et ipsam praesentem E. E. carnaliter cognovisset, et quod ipse praesentis P. fuit pater praetensi infantis, de quo praedicta E. E. tunc gravida fuit, ut ipsa asseruit et praetendebat: ac quod pro ulteriori executione praemissorum iidem the defendant Best and the others adtunc et ibidem inter se agreeaverunt et concludere, quod ipse praedictus B. ad praesentem P. acciperet, et eundem P. accusaret, quod ipse praedictus P. tunc nuper praesentia habuisset carnalem cognitionem corporis praesentis E. E. et ipsam E. E. carnaliter cognovisset, et quod ipse praesentis P. fuit pater dicti praetensi infantis, de quo praetendebant ipsam praedictam E. gravidam esse. Et juratores praedicti super sacramentum suum praedic-*

described by the addition of single woman, tho' she has several surnames given her under alias's: An adjudication of two justices that such party was the father would be a bar to the indictment.

An illegal conspiracy is indictable, tho' nothing is done in pursuance of it. S. C. 6 Mod. 185. Salk. 174. Holt 151. D. ac. ante 379. 9 Cp. 56. b. 6 Mod. 100. A conspiracy to charge a man falsely with a spiritual offence is indictable. S. C. 6 Mod. 185. Salk. 174. Holt. 151. Vide ante 379. An indictment for conspiring to charge a man with being the father of a child likely to be born a bastard, need not shew that the child was likely to be chargeable to the parish, or aver that the party to be charged was not the father, S. C. 6 Mod. 137. 185. Salk. 174. Holt 151. The woman shall not be intended to be the wife of such party, if she is

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tum ulterius dicunt, quod prædictus Best in executione præmissorum, ac secundum prædicta conspirationem, consultationem, et agreeamentum inter ipsos Best et alios descendentes, ut præfertur, præhabita, postea scilicet, the said day and year and place, ac in diversis aliis locis infra, &c. vi et a. mis, &c. falso, nequiter, malitiose, diaboliçe, et ex iniqui lucri causa, in auditu quamplurimorum ligearum et subditorum of the queen fidedignorum onerabat et accusabat prædictum P. quod ipse præfatus P. tunc nuper præantea habuisset carnalem cognitionem corporis præfatae E. et ipsam E. carnaliter cognovisset, et quod ipse præfatus P. fuit pater dicti prætensi infantis, de quo affirmabant prædictum E. tunc gravidam esse: ad grave damnum, scandalum, et defamationem præfati P. in pessimum et perniciosum exemplum omnium aliorum in consimili casu delinquentium, et contra pacem dictæ dominæ reginæ nunc coronam et dignitatem suas. The defendants demurred.

Mr. serjeant Weld for the defendant took exception: first, that it did not appear, that any thing came of this conspiracy, and bare conspiring to do an ill thing by another is not criminal, unless the thing be done; for it is the damage the party receives by the conspiracy, that makes it criminal; secondly, that it did not appear, that the fact the defendants conspired to charge the prosecutor with was false, and a conspiracy to charge a man with a fact that is true, is not punishable; and therefore the indictment ought to have said, the prosecutor was not the father of the child; and for the adverbs of falsely, unjustly, wickedly, and devilishly, which were inserted in the indictment, those went to the conspiracy, and the defendants might falsely conspire to charge the prosecutor with a fact that was true; as if they had promised him not to do it: and he resembled this to the case of perjury, where it is not enough to say, a man did *falso*, &c. swear, but the indictment must lay, that the fact was false: thirdly, the woman, upon whose body the child was supposed to be begotten, was laid in the indictment by several surnames; and he said, may be she might be the wife of the prosecutor, and she might go by his name among the rest of her *alias*; and this he said was the rather to be intended, because they charged the prosecutor with being *pater*, which he could not be to a bastard child: fourthly, the indictment ought to have laid that the child was like to become chargeable to the parish; for unless the prosecutor by this accusation were like to be subjected to some penalty, the indictment will not lie: the indictment here is nothing, but that the defendants conspired to tell the prosecutor, that he was the father of the child. E. E. was big with.

The second exception was stirred twice before in Hilary term, and seemed to stick much with the court; and they ordered precedents to be searched. And for the queen were cited the cases of the queen against Kimberley, 1 Lev. 62.

1 *Sid.* 68. an indictment for conspiring to charge J. S. for having begot a bastard of the body of T. G. to the intent to extort money out of him; and held good, and yet no averment that the prosecutor was not the father. And the King against *Armstrong*, 1 *Ventr.* 304. an indictment in the like manner for conspiring to charge one for the keeping of a bastard child, and thereby also to bring him to disgrace. And in both those cases a conspiracy without any further act done was held to be indictable.

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Holt and Gould said that though those cases were debated, yet this exception was never taken in either of them.

Now this Trinity term the court gave judgment for the queen, for they said, the defendants were charged at least with a conspiracy to charge the prosecutor with fornication. And though that was a spiritual defamation, yet the conspiring to do it was a temporal offence and indictable, and the conspiracy was the *gist* of the indictment. And the chief justice said, that confederacies were one of the articles in the commission of *oyer*. And they said, that *E. E.* could not be intended to be the prosecutor's wife, and especially, as *Powys* said, because in the indictment she was named spinster.

Upon some of the arguments in this case, the exception in the case in 5 *Co.* 122. *Long's* case, of (a) *dans* was cited, for which the indictment there was held insufficient. And *Holt* chief justice said, that by his consent they would not be so nice again, and that there was not a case in the law like that. And *Powell* said, that *dans* (b) did tantamount to *et dedit*. And *Holt* and *Powell* agreed, that the case of perjury differed from this case, because unless the matter that is sworn is false, it is not perjury. And it was said, that the prosecutor had been adjudged by two justices to be the reputed father of the bastard *E. E.* was big with. And *Holt* said, if the defendants had pleaded that conviction, it would have been a good bar to the indictment. *Powell* said, that *West's* precedents was a pretty judicious book; but *Holt* said, that there were many bad precedents in it.

(a) Vide ante
20. 138.

(b) Vide ante
20. 138.

Queen *vers.* the inhabitants of Stretford.

Writ of Error and Record post vol. 3. p. 40.

A Writ of error of a judgment given at the sessions of the peace for the county palatine of *Lancaster* against the defendants for a nuisance. And the indictment was, *quod alta regia via, &c.* 11 *Januarii primo, fuit et adhuc est valde lutoſa et tam anguſta ita quod* the queen's people cannot pass without danger of their lives, &c. and the inhabitants of *Stretford* had time out of mind repaired it, and ought to repair it as often as need was. The indictment was found at the sessions held the 22d of *July* the second of the queen.

A parish cannot be indicted for suffering a highway to be very muddy and so narrow that people could not pass without danger of their lives. S. C. but rather differently reported.

11 Mod. 56.

Fort. 253. A tales cannot be granted upon a *venue facias*.

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The defendants pleaded not guilty, and a *venire facias* was awarded, returnable at the next quarter-sessions, and upon the return of the *venire facias* only part of the jury appeared, and thereupon a *tales de circumstantibus* was awarded, and the principal panel and *tales* tried the cause, and the defendants were found guilty and fined 40*l*. The plaintiffs in error assigned the general errors.

Mr. *Raymond* for the plaintiffs in error took exception, that it appeared upon the indictment, that the time the way is laid to be *foeda et lutoſa* is the 11th of *January*, which is in winter, and it is no offence for the highways to be dirty in winter; secondly, that the matter, in which the nuisance seemed to be assigned by the indictment was that the way was *tam angusta ita quod* the queen's people could not pass; and that the parish was not indictable, because the ways were narrow; but there was a particular power vested in the justices of peace by act of parliament, to widen them, but the parish had no power to widen them.

Holt chief justice and *Powell* held the indictment naught, for want of saying, that the way was out of repair. And *Powell* said, that the saying it was *tam angusta* that the people could not pass, was repugnant to it's being *alia regia via*: for if it had been so narrow, people could never have passed there time out of mind. And *Holt* chief justice cited *Duncomb's case*, *Cro. Car.* 366. (a) that inclosing the land next adjoining to the highway would draw upon the owner of the land the charge of repairing the highway.

(a) Vide: Hawk.
c. 76. f. 6, 7.
1 Roll. Abr.
390. A. pl. 1.

The chief justice took another exception, that here was a mis-trial, for a *tales de circumstantibus* cannot be granted upon the *venire facias*. And the judgment was reversed.

Darby *vers*: Anely.

S. C. Salk. 660.

A writ of error to remove the record in an action by bill will not remove the record in an action by writ of privilege. Vide G. 1. c. 13. f. 1. by which variances of this kind are made amendable.

A Writ of error was brought of a judgment in the common pleas, and the writ of error was, *quia in recordo, &c. cujusdam loquelæ quæ fuit in curia, &c. per billam*; and the record returned was, the defendant *attachiatus fuit per breve, &c. de privilegio e curia hic emanens ad respondendum* the plaintiff, one of the attornies of the court of common pleas, *juxta libertates, &c. de placito transgressionis super casum, &c. et unde* the plaintiff, *in propria persona sua queritur, &c.* And a motion was made by Mr. *Eyre* to quash this writ of error for the variance, the writ of error being of

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ANLEY,

of a judgment in a plaint by bill, and the record returned being a record of a judgment upon a writ of privilege. And it was alleged, that attornies had two ways of proceeding in the common pleas, either by writ of privilege, or by bill; and that those proceedings were different. The case of *Covell v. Deval*, 2 Lut. 1634, 1637. was cited, where an attorney brought an *indebitatus assumpsit* against an executor, and the entry was, that the defendant *attachiatus fuit per breve domine regine de privilegio*, &c. as here; and the defendant pleaded a bond to a third person standing out, *quodque* the defendant *nulla habet bona seu catalla quae fuerunt* his testator's *tempore mortis suae in manibus suis administranda*, *nec habuit die exhibitionis billae* of the plaintiff, instead of *brevis*, and that was held an incurable fault. And he said the writ of error in the case of *Thurston v. Slatford*, which was an *indebitus assumpsit* by writ of privilege, and was *loquela quae fuit in curia nostra*, &c. *per breve nostrum*. And so is the entry in 1 Lut. 905. b.

And for these reasons the court quashed the writ of error,

Foy *vers*. Lister.

A Prohibition was granted in this cause in *Michaelmas* term last to a suit in the ecclesiastical court for tithe milk, upon a suggestion of a *modus* to pay from April to November the tenth day's milk once skimmed made into cheese, in lieu of all tithe milk, with intent to have the custom tried, and that the question might be judicially determined. For the plaintiff in the prohibition were cited the cases of *Austin* and *Lucas*, Cro. El. 609. *Moore* 909. a *modus* to pay the tenth cheese made from May day until the first of August, in recompence of all tithe milk for the whole year, is good, because of the labour of the parishioner, which goes to the making the milk into cheese. And *Latch*. 226. a *modus* to be excused of tithes of the odd sheaves of corn, for making the rest into shocks.

Q. Whether a custom to pay from April to November the tenth day's milk once skimmed and made into cheese in lieu of all tithe milk, is a good *modus*, S. C. 6 Mod. 261, with some difference Salk. 554.

Mr. Eyre for the defendant argued, that the labour of the parishioner here was employed about the less valuable part of the tithe, and that would distinguish this from all the cases. For though he admitted it was a good *modus*, in consideration that the parishioner wound up the tenth fleece of his wool at his sheering for the parson, to be discharged of tithes of neckings, or the dirty locks, *vide* 1 Roll. Abr. 646. pl. 17, 649. pl. 5. or in consideration that the parishioner made the grass into hay for the parson, to be discharged of tithes of the after-mowth, *vide* 1 Roll. Abr. 648. D. yet it would not hold *vice versa*.

The suggestion for a prohibition to the spiritual court in a suit for small tithes, if in the affirmative tithes must be proved within 6 months according to 2 & 3 Ed. 1. c. 13.

f. 14. S. C. Salk. 554. *vide* 2 Inst. 663. Those months are calendar months. S. C. Salk. 554. R. acc. Hob. 179. Litt. Rep. 19, and are to be computed from the teste of the prohibition. S. C. Salk. 554. If the court grants a consultation for want of such proof, it will not make the payment of the double costs and damages according to the statute a part of the rule.

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Now this term Mr. *Eyre* came and moved the court for a consultation, because the plaintiff in the prohibition had not proved his suggestion within six months, according to the statute of 2 & 3 *Edw. 6. c. 13. s. 14.* which six months he said were to be accounted from the *teste* of the writ of prohibition, which in this case was the 25th of *November*, and consequently the time of proof expired the 25th of *May*. The chief justice upon the motion doubted if this clause extended any farther than prohibitions to suits for predial tithes, and upon that the counsel were directed to look farther into it. And after upon motion by Mr. *Eyre* in the absence of the chief justice, it was agreed by the counsel for the plaintiff in the prohibition, and by the court, that the act extended to prohibitions to suits for small tithes as well as great. *Watson 489. Yelv. 102. 2 Keb. 134.* and the court granted a consultation. And Mr. *Eyre* moved, that it might be part of the rule, that they should have their double costs and damages according to the statute. But the court said, that could not be made part of the rule, but that they must have them of consequence. Mr. *King* for the plaintiff in the prohibition cited the case in *Moore 573.* that the time of six months given by the 2 *Edw. 6.* to prove the suggestion, ought to be intended six months in term-time, and that the vacation should be no part of the time, and that consequently the time in this case was not expired. But the court over-ruled him, and said, it (a) had been adjudged contrarywise since.

(a) Vide Noy
30.

N. B. For precedents of entries of proofs of suggestion, see *Co. Intr. 462, 463, 464.*

Precedents of writs, and entries of awards of consultations for default of proving the suggestion, see *Ashton's Intr. 444, 445.* Same entry *Book of judgments 97.* and *Thesaurus Brev. 80.* But note, that the entry in *Ashton* is ill, in the award of the costs; for there is only an assessment of them, viz. *ideo consideratum est* that the defendant in the prohibition *recuparet, &c.* And so is *Yelv. 119. 1 Brownl. 98. S. C.*

Scawen *vers.* Garrett.

S. C. Salk. 545. Holt 587. Plea. Lill. Entr. 3.

An attorney may plead that he is an attorney.

An attorney need not refer to the record when he pleads that he is an attorney.

On a dilatory plea in respect of some matter applying to the person of one of the parties, such matter may be stated without a venue. R. acc. ante 3014. D. acc. ante 853. It is never necessary to allege where the court of common pleas sits.

THE defendant pleaded his privilege of attorney of the common pleas, to an action brought in this court, and pleaded it without producing any writ of privilege. Mr. *Ward* took exception to the plea, that where the defendant laid himself to be attorney, he did not say,

prout

prout patet per recordum; and yet attorney or not, must be tried by the record.

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Mr. serjeant *Broderick* said, that the precedents were all otherwise, and that they need not aver it by the record; because the matter of record was not the only matter in issue, but also the identity of the person.

The court inclined against the exception, but gave day over to search precedents. And now Mr. serjeant *Broderick* said he could not find any ancient precedents; but there were some in some later books, and they were all without. As *1 Brown. Intr. 2 Thomps. Intr. 4 Clift's 570.* And he said, that the plaintiff by his demurrer had confessed, that the defendant was an attorney.

Brevia Jud. 169,
172.

Halt chief justice said, that a (a) demurrer confessed nothing but what was well pleaded. They all agreed, that attorney or not, was triable by the record.

(a) R. acc. ante
1055. post 1243.

The chief justice said, there were two ways of pleading this matter, so as it could not be denied, viz. with a *proferet* of a writ of privilege, or of an exemplification of the record of his admission of attorney. Or else it may be pleaded as it is here. And as to the averment by the record, it is never pleaded as a matter of record, which is always pleaded with time, viz. of such a term, &c. but never any plea was seen, that the defendant was of such a term admitted an attorney, &c. He said, that in an avowry for a fine in a court-leet, you never say, *prout patet per recordum*. He said, that the plaintiff in this case might have pleaded *nul tiel record*. The exception was over-ruled.

Avowry for a
fine in a court-
leet does not say,
prout patet per
recordum.

Mr. *Ward* took another exception, that there was no place laid, where the defendant was attorney, nor where the common pleas was. And though by the statute the common pleas is to be held in *aliquo certo loco*, yet that need not be *Westminster*, but may be *Hertford*, &c.

The chief justice said, it was not necessary to lay a *venue* where the defendant was attorney, because that being a matter concerning the person of the defendant, should be tried where the writ was brought. And therefore where *alien nee* is pleaded in abatement, the (b) plaintiff may reply generally, that he was born in *England*, without laying a place, because it shall be tried where the writ is brought. But if *alien nee* be pleaded in bar, there (c) the plaintiff must reply, that the plaintiff was born in *England*, viz. at such a place.

(b) R. acc. post
1243.

(c) D. acc. post
1243. vide post
1504. Str. 9.

Powell

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GARRATT.

Powell agreed. And he put the case, where in trespass the defendant justifies, because the plaintiff is his *villein regardant* to such a manor, &c. the plaintiff replies, that he is free: he need not allege a place, because it shall be tried where the writ is brought. And as to the matter of laying a place for the common pleas, the chief justice said, it was not necessary, for they could write to the chief justice of that court by that name, where-ever the court was. And he could not imagine the reason, why it had been held necessary to shew it in pleading a record, unless it were, that that was part of the description of the record.

Powell gave the same answer to this objection, as to the second.

The bill was abated, *nisi*, &c.

Regina *vers.* Sainthill.

Writ of Error and Record post Vol. 3. p. 43.

An indictment for not repairing a bridge ought to shew what the right of passage over it, is. S. C. Salk. 359.

In such an indictment 'tis sufficiently certain to state by way of breach that "the Western part of the bridge containing half of it" was out of repair. S. C. Salk. 359. vide Burn, Highways. XVI. 7.

The words "communis semita" shall be understood to mean a public way. S. C. but no judgment. 5 Mod. 255. Salk. 359. Holt 129.

A Writ of error of a judgment given at the sessions of the peace, before the justices of the peace, upon an indictment for not repairing a bridge. The indictment sets forth, *quod* the defendant *vi et armis apud B. &c. occidentalem partem cujusdam communis pontis pedalis communiter vocati L. scituati super rivum de Calme in quadam communi semita pedali ibidem ducente a B. usque H. ac continentem in se dimidium ejusdem pontis tam ruinosam confractam et in decasu esse permisi ob defectum reparationis et emendationis ejusdem partis, ita quod ratione inde ligei subditi dictae dominae reginae in per et super pontem praedictum ire, transire, seu laborare, prout debent et solebant, sine magno periculo non possunt, ad grave damnum et commune nocumentum eorundem subditorum et ligeorum, ac contra pacem, &c. et juratores praedicti ulterius praesentant, quod the defendant ratione tenurae, &c. reparare debet et solebat. This case was spoke to twice in Michaelmas term last. And Mr. Eyre took two exceptions: First, that it did not appear to be a bridge in a common highway, as it ought, but was only in *communi semita*. For the statute of 22 Hen. 8. c. 5. which gives the jurisdiction to the justices of peace in their sessions in cases of nuisances of bridges, is confined by the words to bridges in the highways: and so my lord Coke holds in his exposition upon the statute, 2 Inst. 707. and therefore he says the indictments upon the statute are, *quod pont publicus, et communis situs in alta regia via super flumen seu cursum aquae, &c.* And agreeable to this are the precedents in *West* 119, 156, 157. Secondly, that the indictment in assigning the defect of reparations was too general, being only *occidentalem partem*; whereas it ought to have been that so many feet in length, and so*

many

many in breadth were *ruinosi*. &c. And for that he cited 2 Roll. 81. n. 16, 17. an indictment for stopping *quandam partem regiae vias apud K.* naught, for want of saying what part, as so many feet in length, and so many in breadth, &c. So an indictment for stopping *quandam partem regiae vias continentem per assimationem* so many feet in length, and so many in breadth, naught for the uncertainty of *per assimationem*. To the first Mr. King made answer, First, that this must be taken to be a bridge in a common highway, because it is said to be *communis pons*, and that by reason of its being out of repair *ligei subditi dictas domine regine* could not pass *prout debent et solebant*. Secondly, that there was a *communis strata*, which was not the queen's highway, as C. L. 56. a. and that no action lies for a nuisance in such a way; but only an indictment: and that the way in question must be taken to be such. And that the justices had an original power of inquiring into nuisances by their first creation by the statute of Ed. 3. before the statute of 22 H. 8. that in *West's Precedents* 156. *sect.* 346. there was an indictment that was only, that *communis pons apud, &c. adeo confectus, &c.*

As to the second exception, the court over-ruled it upon the first argument, and held, that it being said, *continentem in se dimidium ejusdem pontis*, that made the *occidentalem partem* certain enough; for it is half the bridge, be that half more or less. As to the first the court then seemed to think it a good exception, and that it ought to have been in *semita communi pro omnibus ligeis domine regine*: and if that had been so, they agreed it would have been well, for that the bridge need not be laid to be in *alta regia via*. But as to Mr. King's first answer they held, that would not help it, for those words were by way of inference only, which would do no good without premises.

The last day of Easter term last, the case was mentioned by the court, and they held the indictment naught, because it was *pons pedalis*, which signifies a bridge of a foot long, instead of *pedestris*. And so it does not appear what sort of bridge it is, whether a bridge for carts and carriages, or for horses, or for footmen only, which is necessary to be shewn. And the case in *Stiles* 108. the King against Sir Henry Spiller was mentioned, where it was allowed to be a good exception to an indictment for not repairing a bridge, because it did not shew, whether the bridge were a cart bridge, or a horse bridge, or a foot bridge, or what other passage was over it. As for the exception to *communis semita*, they held it was well enough. And they remembered the case of the King v. *Thrower* in my Lord Hale's time (1 Ventr. 208. 3 Keb. 38.) where an indictment was for stopping *communem viam pedest-*

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term ad ecclesiam de Whitby; and the indictment was held to be good; for it should be taken to be a common foot way, and that the church was only the *terminus ad quem*. And *Styles* 108. S. C. exception taken that it does not shew the bridge is in the highway, and over-ruled; because it says it is a common bridge, which is enough, and it is needless to say, it is in the highway. (*West* 3. 346. *acc.*) But the court did not at that time reverse the judgment.

But afterwards the last day of this term the judgment was reversed for the exception of *pedalis*, as Mr. Pengelly informed me.

Ball *vers.* manucaptors of Ruffel.

S. C. Salk. 602.

In setting out a recognizance of bail on oyer, the plaintiff ought to shew in what term it was taken.

But the omission will not intitle the defendant to insist that there is a variance between the recognizance in the declaration, and that which is set out upon the oyer.

An irregular *capias* ad satisfaciendum is sufficient to warrant proceedings against bail.
R. acc. ante 1096.

A *Scire facias* against bail. The writ set out a recovery against Ruffel, *cumque etiam E. T. de Sc. et J. F. de Sc. alias scilicet termino sancti Hilarii ultimo praeterito in eadem curia nostra coram nobis apud Westmonasterium personaliter venerit et deventere plegii, &c.* that if judgment should be against the defendant, that the money recovered should be levied of their lands and chattels, *si contingat* that the defendant should not pay it, *nec se prisonae marescalciae nostrae ea occasione reddere, praedictus tamen the defendant debitum, &c. nondum solvit nec se prisonae marescalli marescalciae nostrae hucusque reddidit prout, &c.* the defendants pray oyer of the recognizance, and it is entred in *haec verba*. Robertus Ball executor testamenti et ultimae voluntatis Caroli Ball defuncti queritur, &c. in an action of debt for 80 l. on a bond, and the defendant by his attorney *venit et defendit vim et injuriam quando, &c. et super hoc coram domina regina apud Westmonasterium venit E. T. de, &c. et J. F. de, &c. in propriis personis et deventerunt plegii, &c.* for the defendant *quod si contingat, &c. debitum et damna* to the plaintiff *minime solvere aut seipsum prisonae marescalli marescalciae dominae reginae coram ipsa regina ea occasione non reddere, &c. quo lecto, &c.* the defendants plead that no *capias* was sued out and returned against the principal. The plaintiff replied and set out a *capias*. And the defendants demurred. Several exceptions were insisted on by Mr. Pengelly.

First, That the plaintiff in his oyer ought to have set out what term the recognizance was of, that it might appear to be the same with that upon which the *scire facias* is grounded; but as this is set out without any term, it does not appear to be the same. But to this the chief justice said, that this was an imperfect oyer; not being the whole record, but then the defendant should have insisted upon want of oyer, and not have gone on. But it is no variance,

The words "the prison of our Marsha sea," in a recognizance of bail in the king's bench, shall be taken to mean the king's bench prison.

And to they shall in the breach in an action upon such recognizance. R. acc. ante 804.

for

for what is set out agrees well enough with the recognizance upon which the *scire facias* is grounded.

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Secondly, That it appeared by the *capias* set out in the replication, that there were but five days between the *teste* and return of it; whereas every *capias* sued out against the principal in order to charge the bail, ought to have eight days between the *teste* and return, and (a) ought to lie four days in the sheriff's office. Which the court agreed, but said that it was only an irregularity in proceeding, and therefore the defendants should have moved the court to have them set aside for the irregularity. But in point of law the chief justice said, process in the court may be made returnable *de die in diem*, especially process which goes into *Middlesex*.

(a) Acc. Salk.
599.

Thirdly, and which was the principal objection, that the plaintiff had not assigned a sufficient breach, by reason of the variance in the stile of the prison between the *scire facias* and the recognizance. For the breach was too large, the word *marescalciae* being used for more prisons than the prison of the king's bench. The prison of the palace court is called *mareschalcia hospitii domini regis*, and the keeper of it is called *marescallus marescalciae hospitii domini regis*, 10 Co. 68. b. *Thes. Brev.* 233. And *marescallus* indeed signifies no more than a keeper, and so is *Spelman verbo marescallus*. And there the citation out of the red book of the exchequer makes mention of the marshal of the exchequer. And there being so many marshals and marshalleas, *prisona marescalli marescalciae dominae reginae* may as well be taken for the marshal of the marshalleas of the household's prison, as the prison of the queen's bench. For that is never stiled *marescalcia dominae reginae*, or *prisona marescalciae marescalli dominae reginae*, but always *prisona marescalciae marescalli dominae reginae coram ipsa regina*, as it is here in the recognizance; or else *mareschal del bank le roy*, as it is in *F. N. B.* 251. J. and 5 *Edw.* 3. c. 8. And if so, then the breach is too large. The exception stuck with the court some time. And Mr. *Raymond* spoke to it for the defendants. And the last day of the term the court gave judgment for the plaintiff, because it being a bail here, *prisona marescalli marescalciae nostrae* must be intended the prison of the marshal of this court, for the court cannot take any other bails.

Powell justice said, when this case was stirred before, that all these marshalleas were derived from the earl marshal, and that he had granted the inheritance of the office of marshal of this court out of him.

Spelm. ubi supra. D. acc.
ante 805.

Holt

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manuscript of
RUSSEL.

Holt said, that the marshal of the household is never filed
marescallus marescalciae nostræ:

Warner *vers.* Sir Edward Irby.

A defendant cannot plead a misprision of addition after he has admitted himself to be the person mentioned in the declaration. R. acc. ante 1015.

By beginning his plea with the words, "and the said J. S." he admits himself to be the person mentioned in the declaration.

A plea in abatement must shew how the plaintiff should have sued. R. acc. Turton v. Wortley. B. R. M. 24 G. 3. post. 1547. Adm. Ann. 286. Bl. 27. acc. 3 Bl. Com. 302. Vide post. 1207. Therefore a plea of misprision of addition must shew what the defendant's right addition is. R. acc. post. 1547. Adding a particular one after his name in the beginning of the plea is not sufficient to shew what it is; it ought to be substantially stated in the body of the plea.

IN two actions against the defendant by the name of Sir Edward Irby baronet, the defendant pleads in one thus: *Et prædictus Edwardus Irby armiger, in propria persona sua venit et dicit*, that he is not a baronet: and in the other he pleaded the same matter, only with this difference, that he said only *prædictus Edwardus venit, &c.* The plaintiff demurred. Mr. Southouse took exception to the pleas, that it was said *prædictus Edwardus*, which was admitting himself to be right named, and after that he is estopped to plead any *misnosmer*. But he ought to have pleaded, that *Edwardus Irby armiger, qui per nomen Edwardi Irby baronetti* is sued, *venit in propria persona sua, &c. et dicit, &c.* Serjeant Broderick for the defendant insisted, that there was a difference, where *misnosmer* of the surname or addition is pleaded in abatement, and where *misnosmer* of the Christian name: there you may say *prædictus* the Christian name, where it is the *misnosmer* of the surname is pleaded, or *prædictus* the Christian and surname where it is only the *misnosmer* of the addition: but otherwise if *misnosmer* of the Christian name be pleaded. And he cited 1 Edw. 4. 3. and said, that all the books were so. Holt seemed to doubt the difference, but said, that if it were so, yet the plea was naught, for want of shewing what he is. For every one that will abate the plaintiff's writ, must give him a better. And therefore it is not enough for the defendant to say, he is not a baronet, without shewing what he is. And besides he said, one of the pleas was not within his own rule, for he ought according to that to have said only, *prædictus Edwardus*, or *prædictus Edwardus Irby*, and not *prædictus Edwardus Irby armiger*. But the surest way of pleading it would have been, to have said, *venit Edwardus Irby armiger*, who is sued *per nomen Edwardi Irby baronetti, et dicit*, that he is an esquire, and not a baronet.

The court gave judgment, that the defendant *respondet ulterius, nisi, &c.*

Regina *vers.* Franklyn.

THE defendant was indicted for using the trade of a sempstress, not having served an apprenticeship to it, &c. And the indictment was, *ubi revera* the defendant never was educated in the said art or mystery *tanquam apprenticus* for *apprenticius*. And because the word *apprenticus* was nonsense, the indictment was quashed. And judge *Powell* took another exception, that the defendant was called labourer, which he said was not a good addition for a woman. *Pasch. 5 Annæ B. R. Regina vers. Maddox*, such an indictment was quashed for the same exception. And *Holt* said, that the word apprentice was the very material word of the statute; and that an indictment for exercising a trade, in which the defendant had not been educated for seven years, without the word apprentice, would be ill, which *Powell* agreed.

Wilson *vers.* Ingoldsfby.

A Writ of error of a judgment in the common pleas in ejectment, *teste* the first year of the queen, judgment was not given in the ejectment till the third year of the queen, and then the record was transcribed, and brought into this court. And the defendant in error sued out a *scire facias quare executio non* to compel the plaintiff to assign errors. And the plaintiff in error pleaded *nul tiel record*, and upon bringing in the record, the counsel for the plaintiff in error moved that here was a *failer* of the record, which the court agreed. For they said, that the plea is *nullum tale habetur recordum*, which refers to the *scire facias*, which recites a record of a judgment in the common pleas removed hither by writ of error, which this record never was, no judgment having been given till after the return of the writ of error was out. The chief justice said, that this being a record of the same court, it would have been most proper to have prayed *oyer* of it.

A writ of error will not remove a judgment given after the term in which the writ of error was returnable. R. acc. post. 1531 vide Str. 834. 891. 1 T. R. 28.

And tho' the record is transcribed after the judgment given, and carried into the court in which the writ of error was returnable, the judgment is not to be considered as removed.

Regina *vers.* Mackarty et Fordenborough.

Indictment post Vol. 3. p. 325. Cr. Circ. Ass. 414.

AN indictment against the defendants for that they *exsistentes lucri inhonesti avidi, et nequiter, falso, deceptivo, et malitiose intendentes Thomam Chowne de London haberdasher de*

An indictment against two for bargaining to barter with J. S. a certain quantity

vinipræfens, as good and new Lisbon wine, for a quantity of hats of J. S. of the value, &c. and affirming vinum præfensum prædictum fore real new Lisbon wine, when, in fact it was not, and for that one of them then and there super se assumpsit that he was a merchant of London, and dealt as such in Lisbon wines, and then and there personated a merchant of London at si fuisset a real merchant when in truth he was not, and did not deal as a merchant of London in Lisbon wines, and for that the other then and there assumpsit super se that he was a broker of London, &c. and for that J. S. believing their pretensions delivered them a quantity of hats of the value, &c. for the said pretended wine, is good, S. C. 6 Mod. 301. vide ante 1013. and the books there cited, tho' it does not specify the quantity of the pretended wine, S. C. 6 Mod. 301. or the number of hats, or shew that the defendants knew the pretended wine not to be real Lisbon wine. S. C. 6 Mod. 301. vide 1 Hawk. c. 105. s. 6. The words at si fuisset a real merchant are surplusage. S. C. Mod. 301. The word "prædictus" may be surplusage, tho' the matter with which it is used is material, and had not appeared before. R. acc. ante 192. and see the books there cited.

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diversis bonis et merchandizis suis defraudare, such a day year and place, insimul deceptive bargainizaverunt cum praefato T. C. ad commutandum, Anglice to barter, vendendum et excambiandum quandam quantitatem vini praetensi, ut bonum et verum novum vinum regni Portugalliae vocatum new Lisbon wine, ipsius A. F. pro quadam quantitate galerorum, Anglice hats, ipsius T. C. ad valentiam 118l. bonae et legalis monetae Angliae: et super commutationem venditionem et excambiationem praedictas ipse praedictus A. F. assumpsit super se esse mercatorem Londini, et negotiare et merchandizare ut mercator in vinis regni Portugalliae, et adtunc et ibidem personavit mercatorem Londini at si fuisset verus mercator Londini, ubi in facto ipse praedictus A. F. nunquam fuit mercator Londini, nec negotiavit vel merchandizavit ut mercator in vinis regni Portugalliae, seu aliquo vino quocunque, ut mercator; et super commutationem, venditionem, et excambiationem praedictas ipse praedictus M. M. assumpsit super se esse bargainizatorem, Anglice a broker, Londini, et adtunc et ibidem personavit bargainizatorem Londini, at si fuisset verus bargainizator Londini, ubi in facto ipse praedictus M. M. tempore commutationis venditionis et bargainizationis praedictae, seu unquam postea non fuit bargainizator Londini; ac praedictus T. C. fidem adhibens eisdem fictis assumptionibus, personationibus, et deceptionibus, adtunc et ibidem commutavit vendidit et excambiavit praedicto A. F. et deliberavit eidem M. M. ut bargainizatori inter praedictum T. C. et A. F. pro usu ipsius A. F. quandam quantitatem galerorum valentiae 118l. pro doliis praedictis vini praetensi praedicti: et quod praedictus M. M. et A. F. super commutationem bargainizationem et venditionem praedictas affirmabant vinum praetensum praedictum fore verum novum vinum regni Portugalliae, vocatum new Lisbon wines, et fore vinum praedicti A. F. ubi in facto praedictum vinum praetensum non fuit vinum regni Portugalliae, nec potabile, nec salubre, nec fuit vinum praedicti A. F. in magnam deceptionem et damnum ipsius T. C. in contemptum dictae dominae reginae nunc, legumque suarum, et contra pacem dictae dominae reginae nunc coronam et dignitatem suas, &c. This indictment was found at the sessions of the peace in London, and removed into the king's bench by certiorari. And upon not guilty pleaded, the defendants were at nisi prius before the lord chief justice Holt in London convicted. And now Mr. Common Serjeant and Mr. Raymond took several exceptions to the indictment in arrest of judgment.

1. That here was no offence laid, for the agreement was, as it is here laid, to barter, sell and exchange a certain quantity of pretended wine as good and true new Lisbon wine for a certain quantity of hats. Now to have made an offence of it, it should have been laid, that the defendants pretended this liquor to be new Lisbon wine, and pretending it to be such did barter, &c. it for such a quantity of hats. And *Dee* said, that the bargain, as it is here laid, is nonsense and impossible;

impossible; for either it is wine, or no wine; if it be wine, then it is not *praetensum*, and if it be *praetensum*, it is not *vinum*.

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2. That the indictment was uncertain, it not appearing how much of this *vinum praetensum* the prosecutor was to have for the hats, and consequently to what degree he was cheated, which it ought to do, as well as in cases where damages are to be recovered, because the fine ought to be greater or less. And several cases were cited to this purpose; *The King vers. Forster*, Trin. 11 Will. 3. ante 475, and the cases there cited; and 2 Leon. 38. *Henbeck's case*. An information upon the statute of Hen. 6. which requires that all pipes of wine shall be gauged, &c. before they be sold, and that so much of the price as it wants in measure shall be abated, on pain to forfeit the value to the king and the informer; and that the defendant had sold several pipes of wine, of which none contained 126 gallons; and that he had not abated the price in proportion; and because he had not shewed, how much was wanting in each pipe, judgment was against the informer. [For uncertainty take the cases following, 5 Co. 34. *Plaister's case*, trespass *quare pisces cepit*, without shewing the number or nature, ill. Mich. 8 Will. 3. in the common pleas, *Smith vers. Therbold cit. ante 192. trover pro parcella culmi*, judgment arrested after verdict. Indictment for ingrossing *diversos cumulos tritici*, ill. 2 Bulstr. 317. *Rex vers. Goldsbrough & Whistler*, and 2 Roll Indictment, p. 13, 14, 15. fol. 80.]

3. *Dee* said, that *assumpsit super se*, &c. was improper; for that was, he promised, and not pretended, which was intended. That *at si* was also improper, and signified *but if* which was nonsense, and not *as if*, which is *ac si*. 4. That to make it an offence, they ought to shew, that the prosecutor delivered the hats, which they had not done. For when they came to lay that, they say, *deliberavit eidem M. M. &c. quandam quantitatem galarorum valentiae 118l. pro doliis praediis vini praetensi praediis*: and there are no doliis mentioned before. And by Mr. Raymond, where a *praediis* or a *scilicet* shall be rejected, the difference is, where the matter appears once well upon the record before, and then a *praediis* or a *scilicet*, which is repugnant, follows, it shall be rejected, because there is enough before for a foundation for their judgment. But where that which follows the *praediis*. or *scilicet* is material to the point of the action, and not well shewed, as this is, the *praediis*. cannot be rejected, 2 Cro. 149. Yelv. 97. *Jennings v. Markham*; debt upon an obligation to perform an award, *nul award* pleaded; the plaintiff replies an award, that the defendant should pay upon the 21st of May *tunc proxime sequen.* to the plaintiff 20*l.* and that the plaintiff *super praediis* 1*st* of May should release to the defendant all his right in a copy-

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hold upon the payment; and assigned a breach, that he was ready to make the release, and the defendant had not paid the 20*l.* held, that because the release was to be made the aforesaid 1st of *May*, and there was no such day mentioned before, the award is insensible and void, and no money need be paid. 5. That the affirmation that it was new *Lisbon* wine, will not support the indictment. For the rule of law is *caveat emptor*. And therefore 2 *Cro.* 4. *Chandler v. Lopus*, an action does not lie against a goldsmith for selling a stone, affirming it to be a *bezoar*, where it was not, 386. *Baly v. Merrell*: case does not lie for affirming a thing to be of less weight than it was, or that a horse has two eyes where he has but one. *Yelv.* 20. *Harvy v. Young*: it does not lie for affirming a term to be of the value of 150*l.* where it was worth but 100*l.* Indeed where a man is in possession of a thing, and, in order to sell it, affirms it to be his, where it is not, case will lie, 1 *Cro.* 474 and the case of *Medina v. Stoughton*, *Trin.* 12 *Will.* 3. *B. R.* ante 593. and the cases there cited. But if it should be criminal to make such an affirmation, yet it can never be so, unless the defendant knew what he affirmed to be false. And therefore the indictment ought to say at least, *ubi rêvera* the defendant knew *vinum prætensum prædictum non fore vinum regni Portugalliae*, and not to say only, as it is here, that the *vinum prætensum* was not *vinum regni Portugalliae*; for it may be, the defendant might understand wines no better than the prosecutor. And therefore 9 *Hen.* 6. 53. p. 37. there is a case cited to have been adjudged in the king's bench, that if one sells a piece *de panno laneo sciens ipsam esse rancam*, and not well fulled, an action lies without a warranty.

Mr. *Southouse* for the queen acquainted us, that the indictment was of his drawing. He said, that as to the quantity of *vinum prætensum* the prosecutor was to have, it was not material to lay that. First, because it was laid expressly in the indictment, that it was good for nothing, that it was *non potabile nec salubre*; and therefore how much soever there was of it, that would not alter the case. Secondly, that the thing the prosecutor was cheated of was the hats, and therefore it was only material to shew how many of them there were; and they had made that certain enough by saying, that it was a certain quantity of hats *ad valentiam* 118*l.* That if a man was to be indicted for cheating another at play with false dice, it would be no ways material to lay how many dice he played with, when he cheated him; but the matter material to be laid, is the sum he cheated him of. So if a man should be indicted of putting *magnam quantitatem colequintidar* into a pond, and poisoning so many fish, or fish to such a value, that would be good, without shewing the quantity of the
collo-

coloquintidae. He said, he admitted the cases cited for the defendants, of indictments for ingrossing *magnam quantitatem fœni*; and the cases in *Roll's Abridgment*, &c. for there the uncertainty was in that, that was the offence. But here the hats the prosecutor was cheated of, which is the offence, are certain enough, *viz.* to the value of 118 l. He also cited the case of *The King v. Wetwang*, 1 Lev. 203. an indictment for taking out of a pond *quosdam pisces vocatos carp fishes, de bonis et catallis* J. S. and upon exception for the uncertainty, because it is not said how many, and *Plaister's* case cited, *Keeling* and *Wyndham* over-ruled the exception, upon the difference between indictments, and actions where damages are to be recovered. For upon an indictment the defendant is to be fined according to the nature of the crime, upon the circumstances of the fact, and not according to the number of the fishes taken; *Twisden contra, Morton* *silente*. He said, *at si* and *ac si* were the same; but however, it was well without; for *personavit mercatorem L.* was the same thing; for if he were a merchant, he could not personate one. As to the *praediæ*. he said, that must be applied to *vini prætensis*; but if that could not be, then it ought to be rejected. And for that he cited 3 Bulstr. 198, 199. *Proby v. Lumley*, in an action of escape against the sheriff upon a *mesne* process; the defendant pleaded, that he had taken the party upon a *latitat*, and that in bringing of him from *Islington prædicto* he was rescued, and pleads the return of the rescue; and exception taken to the *praediæ*, because there was no *Islington* mentioned before; but resolved, that the *praediæ* was surplusage and idle. So 1 Lutw. 561. *Lambard v. Kingsforth*; debt upon a bond to perform an award, the defendant pleads *nul agard*, the plaintiff replies, and sets out an award, that the defendant should pay to the plaintiff, at the house of the plaintiff *apud Sevenoak prædictum*, and assigns a breach in non-payment; and exception was taken to the *praediæ*, because there was no *Sevenoak* mentioned before; but resolved, that the *praediæ* was void. He said, there was no need to say, *sciens*, because the fact itself, as it was laid, was a crime. He said, that upon the whole, taking all the indictment together, it appeared to be a cheat.

Holt chief justice. I do not know what *vinum prætensum* is.

Powell justice. The statute of maintenance mentions pretended rights, and yet a pretended right is no right at all.

The chief justice. It is a fault to buy any right, but it is no fault to buy *vinum prætensum*, pretended wine.

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Powell justice. Pretensed child, in the language of indictments, is, where a woman pretends to be with child. Mr. *Southouse*, you do not answer the exception, that the quantity is not set out, for it ought to appear, that the court may know how to set the fine.

Chief justice. Be the quantity of the wine what it will, the cheat is of the hats.

Powell justice. If a man should bring trespass for taking a great many hats *ad valentiam* 100*l.* that would be naught.

Chief justice agreed; but the reason of that case is, because damages are to be recovered for the hats.

Powell justice. There is the same reason here, because we are to set a fine. As to the *sciens*, that it is necessary to be laid; suppose a man should take bad money, and put it off again; that is no crime, unless he knew it to be bad.

Chief justice. Besides, personating a man is no harm, unless it be to an ill intent. Why shall we presume the defendants knew wine better than the prosecutor?

Powell justice. A man may buy bad wine, and sell it again, without knowing it was bad.

The chief justice said, that the fact, as it appeared upon the evidence, was criminal! This case was first moved in *Michaelmas* term 3^o, and ruled to stay *quousque*; &c. Then Mr. *Southouse* moved for judgment *Pasch.* 4^o. and it was spoke to the effect as before. And now the last day of this term, as Mr. *Pengelly* told me, judgment was given for the queen. And the court said, that the quantity is not necessary to be shewn, and that here was enough set out, to shew the defendants to be cheats.

Speed *vers.* Parry.

S. C. Salk. 697.

Mich. 7 Ann.
B. R. Rot. 222;

AN action upon the case was brought for these words spoken of the plaintiff: "You are a rascal and a villain, you have forgot since you lived in the *Black-bull yard*, there you could procure broad money for gold, and clip it when you had so done; and then the shears could go."

Potential words may be actionable, if they import an act done.

Mr. serjeant *Darnall* moved in arrest of judgment after a verdict for the plaintiff, that those words were not actionable, for that they imported only a power, and not any act done, and every man had a power to clip money, and as he had a power to do it, so he had also to let it alone. And he cited 1 *Roll.* 51. 2. 4. if a man says to another, "He keepeth men to rob me," no action lies: and that words ought to be taken in the most favourable sense.

If a time and place is added to potential words shewing when and where the power existed, they must import an act done.

Mr. *Mountague* for the plaintiff argued, that these words in common parlance imported an act done. And the court were of the same opinion. And *Powell* justice said, that where words were only potential, but a time and place was added, there the words imported an act done; for they cannot import a bare power in that case, because a man has the power every where alike, as well any where else as in the *Black-bull yard*. And he resembled it to a case which was in the common pleas *Trin.* 12 *Will.* 3. *Horne v. Powell*, where an action was brought for these words: "You may well spend money at law, for you can coin money out of halfpence and farthings;" and there the words were held to be actionable, because they imported an act done; for from a bare power, he could never have been the better able to spend money at law. And the chief justice agreed it was a case in point, because there the difference of the charge was only in the tense, and that in the potential mood, as it is here.

Saying a man could clip money when he lived in a particular place is actionable.

Mr. serjeant *Darnall* to encounter that case cited 1 *Roll.* 72. n. 9. where an action was brought for these words: "Thou must needs be richer than I, for thou didst coin thirty new shillings in a day, thou art a coiner of money;" and resolved, that no action lay, because peradventure he was a coiner of money in the mint, and earned money by it. But the chief justice and *Powell* both said, that if that case were to be adjudged now, they would adjudge it otherwise. And Mr. *Page* mentioned a case in the common pleas, which *Powell* agreed, where these words, "You are a coiner of money," were resolved to be actionable; and the case in *Rolle's Abridgment* denied.

'Tis actionable to charge a man with coining money.

So of a person, as if a man speaking of J. S. who is dead, should say to another, you could murder J. S. that would be actionable. C. J. Note to the 1st edition.

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The chief justice said, that words spoken ironically would be actionable, and remembered the case 1 Roll. Abr. 57. pl. 36. where a man said of a receiver of the revenue, "Mr. Deceiver has deceived the king;" and resolved, that it was actionable. And Powell observed, that that was a strong case, because the words were actionable upon the account of the plaintiff's office of receiver only.

This case was first moved the first day of the term, and a rule to stay *quousque*, as usual. And then Mr. Mountague moved for judgment. And the court all along inclined for the plaintiff, but took time to consider; and as Mr. Pengelly informed me, the last day of the term gave judgment for the plaintiff.

Follet *vers.* Troake et alios.

A custom for the reeve of a manor to make a drift of the cattle upon a common within the manor at any time when the steward of the manor shall appoint, and impound such as have no right upon the common any where within the manor, is good.

And not inconsistent with the claim of a right of common throughout the year.

A right of common by prescription may be regulated by custom.

IN trespass for chasing his sheep, viz. 200 sheep, that were feeding upon, and using his common, and impounding them; the defendant as to the *vi et armis* pleads not guilty; and as to the residue of the trespass, *dicit quod tempore quo, &c. et diu ante transgressionem prædictam*, the place where was *clausam pasturæ continens, &c. parcella manerii de C. infra manerium prædictum in comitatu prædicto, infra quod quidem manerium sunt, et a toto tempore cujus contrarii memoria hominum non existit fuerunt, diversa tenementa custumaria infra manerium prædictum secundum consuetudinem ejusdem manerii; quodque quilibet tenens custumarias tenementi custumarii manerii C. prædicti, et omnes illi, quorum statum ipse habet, de toto tempore cujus contrarii memoria hominum non existit haberet communiam pasturæ in prædicto loco in quo, annuatim et quolibet anno per totum annum pro omnibus magnis averiis communicabilibus in et super tenementis suis prædictis levantibus et cubantibus, ac pro certo numero ovium in et super tenementis suis prædictis levantibus et cubantibus respectivo, ratione respectivorum tenementorum suorum custumariorum manerii prædicti tanquam ad tenementa custumaria sua ibidem respectivo spectantem et pertinentem; quodque per consuetudinem manerii prædicti a toto tempore supradicto ibidem usitatam et approbatam ballivus, Anglice the reeve, ejusdem manerii cum tenentibus ejusdem manerii, vel aliquibus eorum, simul cum aliquibus aliis personis auxiliantibus et juvantibus, quancunque per seneschallum, Anglice the steward, manerii prædicti pro tempore existentem jussus, effugavit, Anglice hath driven, oves in et super communiam prædictam despoſcentes, et easdem imparcavit in aliquo loco infra manerium prædictum ad examinandum si aliquis tenens*

A customary tenant in fee simple within a manor may prescribe in his own name. R. acc. Fort. 339. Vide W. Jon. 276. post 1231. 1 Bl. Law Tracts. 144. 147.

custu-

custumarius tenementi custumarii manerii prædicti superoneravit, Anglice hath charged, communiam prædictam depascendo et utendo communiam prædictam per majorem ovium numerum, quam sibi debitum per consuetudinem manerii prædicti ratione tenementi seu tenementorum suorum custumariorum manerii prædicti respective; quodque per consuetudinem prædictam si aliquis tenens tenementi custumarii manerii prædicti super examinationem et scrutationem prædictam inventus sit habere majorem numerum ovium utentium et depascentium communiam ratione tenementorum suorum prædictorum respective tempore effugationis prædictæ, Anglice the driving aforesaid, quam ibidem habere debet per consuetudinem manerii prædicti ratione tenementorum suorum prædictorum respective, quod tunc tot oves talis tenentis, quod sunt ibidem super numerum suum respective sic ut præfertur debitum, detineantur in parco prædicto, tanquam averia inventa dampnum facientia in communia prædicta, quousque pro dampnis prædictis per oves prædictas sic factis satisfaciatur, seu quousque oves prædictas per debitum legis cursum deliberentur; et quod tot oves tenentis quod ibidem depascere debent per consuetudinem manerii prædicti in largum ire permittantur, et in communiam prædictam remittantur. And the defendant farther says, that the plaintiff was a customary tenant of the said manor: and that he and all those, &c. ought to have common for a hundred sheep only, and so brings the defendant within the custom: and that upon the drift the plaintiff had surcharged one hundred sheep, and that the defendant detained one hundred sheep, parcel of the two hundred, in the pound, *quousque*, and let the other hundred go back into the common. To this plea the defendant demurred.

Mr. Squib to maintain his demurrer took these exceptions to the plea. First, that the custom was unreasonable, for the drift to be made at the discretion of the steward; it ought to be upon a surcharge, or at some certain times. Secondly, that these customary tenants must be taken to be copyholders, and then the prescription is ill; for copyholders cannot prescribe in a *que estatis*. Thirdly, that the custom and prescription were confounded. Fourthly, that it was said *per consuetudinem prædictam* where it ought to be *consuetudinem manerii prædicti*.

But this notwithstanding, the court gave judgment for the defendant, *nisi*, on the first argument. First, all the court agreed, that it was a reasonable custom, for the reeve to make a drift by the appointment of the steward. In case of *common sans nombre*, if there be a surcharge, it must be remedied by a writ of admeasurement. But where the common is for a certain number, there a drift is very reasonable. For until a drift is made, it is hard to know whether there be a surcharge or no. And for that reason drifts of commons may be by custom, and there are such customs in all wastes. And it is unreasonable to say, the drift shall not be, unless there is a surcharge, because till the drift is made, it is not possible to know, whether there be a sur-

Surcharge of
common.
F. N. B. 290.
4 Edit.

charge

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charge or no; and the intent of the drift was to discover the surcharge. This is also more reasonable than a custom to drive the common at a certain time; because if that were the custom, the commoners would surcharge the common all the rest of the year, except at those times: and so the custom would be ineffectual for the end it was intended. As to the second exception, it was resolved, that it cannot be taken to be copyholders, for they are *ad voluntatem domini*; and therefore they must be taken to be customary freeholders, and consequently the prescription in a *quæ estate* good. Indeed if they had been laid to be copyhold tenements, then they must have laid a custom for the common, and the prescription would have been ill. As to the third, they resolved that the custom and the prescription were distinct, the prescription for the common, and the custom for the drift. And it might well be, that the freehold tenants might have a common by prescription, and a drift of the common by custom. As to the fourth they resolved, that it was very fully laid before, that there was a custom within the manor, &c. and that the words *per consuetudinem prædictam* related to that.

Mr. *Squib* then took another exception, that the custom was ill to impound them any where within the manor, for that they ought to be impounded some where within the waste; and ought not to be drove out of that. But the court resolved, that it was good, to impound them any where within the manor. And *Holt*, it was reasonable to drive them off the waste, because the common was to be cleared of them. Judgment was given for the defendant; *nisi*, &c. The last day of the term Mr. *Squib* moved it again, and took another exception, that this drift of common was repugnant to the prescription; for that was to have common *annuatim et quolibet anno per totum annum*; which was interrupted by this drift: but that seemed a ridiculous objection; and the rule was made absolute, as Mr. *Salkeld* told me, and his plea confirmed.

Regina *vers.* Harper.

S. C. Salk. 611.

THE defendant was indicted for using the trade of a merchant-taylor, not having served an apprenticeship to it, &c. And Mr. serjeant *Broderick* moved to quash it, because it was not a trade within the statute; and it was quashed, *nisi* before the end of the term. And some days after Mr. *Eyre* moved to quash an indictment against one *Cornish*, Salk. 611. for using the trade of a sempstress, &c. for the same reason. But the court refused it, because they said they could not take notice what was, or what was not, a trade within the statute. But there being an averment in the indictment, that that was a trade used within the kingdom

dom of *England*, at the time of making the statute of 5 *Eliz.* and the words of the statute being general, any craft, mystery or occupation, now used or occupied within the realm of *England* or *Wales*; if this were not a trade within the statute, the defendant would have the advantage of it upon not guilty. And Mr. *Eyre* remembered the case of the *Queen* against *Harper*. But the court said, that case differed from this, and that the reason why that was quashed was, because they could not understand what a merchant-taylor is; and that there was no such trade.

Note, Mr. *Eyre* said, he had known many indictments on this statute quashed for that exception. And it seems to me, that what is a craft, mystery, or occupation, is matter of law.

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Regina *vers.* Wyatt.

THE defendant was indicted at the assizes at *Suffex.* And the indictment set forth, that whereas one *Thomas Nash* 28 *August* 13 *Will. 3.* was convicted before two justices of peace upon the information of one *W. M.* and upon the oath of *R. H.* of being aiding and assisting to one *E. R.* in the unlawful killing of five deer, upon the 11th of *April* then last past, in the park of Sir *W. M.* And whereas the same *T. N.* on the same 28th of *August* was convicted before the same justices upon the information of the same *W. M.* and upon the oath of the same *R. H.* of being aiding and assisting to the said *R. H.* in the unlawful killing of two deer upon the 8th of *July* then last past, in the park of *M. M.* and *C. M.* and whereas the said two justices afterwards, *viz.* the 2d of *September* in the said year, at *Arundel* in the county of *Suffex*, made a warrant under their hand and seals directed to all constables, headboroughs, and other officers of the said late king, within the said county, to levy by way of distress of the goods and chattels of the aforesaid *T. N.* five several sums of 30 *l.* amounting in the whole to 150 *l.* by him forfeited for the first mentioned offence, *et quod ipsi vel eorum aliqui retournam facerent, vel eorum aliquis retournam faceret, præfatis justiciariis vel eorum uni ad certum diem abhinc longe præteritum in eodem warranto mentionatum qualiter warrantum illud fuerit executum*; and then sets out in the same manner another warrant on the second conviction which several warrants *postea, scilicet, 2 Septembris anno*

Constables are the proper officers of justices of the peace. *S. C. Salk. 380. Fort. 127. acc. 2 Hawk. c. 10. f. 35.*

The constable of an hundred is as much the officer of justices of the peace as the constable of a parish. *S. C. Salk. 175, 380. Fort. 127.*

If a statute authorises a justice to make a warrant for levying goods without saying who shall execute it, the constables are bound to execute it. *S. C. Salk. 380. Fort. 127. acc. 2 Hawk. c. 10. f. 35.* Authorizing a prosecutor to

detain an offender until a return shall be made to a warrant of distress does not preclude a justice from directing such warrant to a constable. A constable may be indicted for refusing to make a return to a warrant which is returnable. *S. C. Salk. 380. 11 Mod. 53. Fort. 127.* Tho' no place is appointed for its return. *S. C. 11 Mod. 53. Fort. 127.* Matter of record when but inducement need not be stated with a prout patet per recordum. *S. C. Fort. 127. R. acc. ante 35.* On an indictment for not returning a warrant upon a conviction, the statement of the conviction is but inducement. *S. C. Fort. 127.* On such indictment the jury may come from the place where the warrant was delivered and the place where the neglect to return it is stated to have occurred only on such an indictment if the warrant is stated to have been made returnable at a certain day then past, and that afterwards, to wit on the day it bears date it was delivered to the defendant, it shall be taken that the delivery was made before the day appointed for the return. *Vide Str. 233. 1 Saund. 169. Burr. 1729.*

supra-

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supradicto, were delivered to one *Richard Wyatt*, then being one of the constables of the hundred of *A.* in the said county, viz. *apud Felpham praedictum in comitatu praedicto* to be executed: the said *Wyatt* afterwards, viz. the said 2d of September, at *Walburton* in the said county, and within the said hundred, by virtue of the said several warrants, levied the money of the goods of *Nash*; yet the said *Wyatt*, the said 2d Septemb. anno *supradicto*, seu unquam postea to the taking of the indictment *non fecit, nec fieri causavit, praefatis* the justices, seu eorum alteri, aliquam retornam of the said warrants, or either of them, seu qualiter et quomodo executi fuerint warranta illa, vel eorum alterutrum, prout he was commanded by the respective warrants, sed retornam of the said warrants, or either of them *facere* to the said justices, or either of them, *illicite, obstinante, et contemptuose adtunc apud Felpham praedictum in comitatu praedicto recusavit et denegavit, et adhuc recusat et denegat, &c.* The defendant to this indictment pleaded not guilty; a venire facias was awarded de vicineto de *Felpham*, and he was tried and was convicted at the assizes. And a certiorari was brought by the direction of *Gould* judge of the assize, and the record removed into the king's bench. And there, after three several arguments by *Mr. Mountague*, *Mr. Eyre*, and *Mr. Whitaker* for the defendant, and by *Mr. serjeant Broderick*, and *Mr. serjeant Chesbire*, and *Mr. Attorney* for the queen, judgment was given for the queen, and the defendant fined 200*l.* which was the sum levied, by the opinion of the three judges against *Holt* chief justice.

The case was argued *seriatim*. And first *Gould* justice argued for the queen as to the first objection, that the constable is not obliged by law to execute the justices warrant in this case. That strikes at the act of 13 Car. 2. sess. 1. c. 10. against deer-stealers, for there in the same manner as here, the penalty is directed to be levied by way of distress, upon the goods and chattels of the offender, by warrant under the justice's hand before whom such conviction shall be made; but no officer named, who shall execute the warrant, no more than here. But upon both acts, the constable is to execute it. For the penalty is to be levied by warrant of the justice; therefore he is not to levy it himself, and therefore he must send the warrant to his officer, which is the constable. And a constable of a hundred is as much an officer to the justices of peace, as a constable of a parish. And he is properer, because he has a larger jurisdiction, for the goods might be out of the limits of the other's jurisdiction. Besides, when this power is vested in the justices of peace, they must proceed to execute it, in the same manner as they do other things in their power. As if an act of parliament were to make any thing a nuisance, the party who should be guilty of it must be proceeded against of consequence in the same manner, as for a nuisance at common law.

As to the second objection, that when the convictions are set out, there is no conclusion *prout patet per recordum*, and that the *venire facias* is only *de vicineto de Felpham*, and not of *Arundel*, where the warrant was made, and *Walberton*, where it was executed; whereas it ought to have been from them as well as *Felpham*, I answer, that those matters are only inducement, but that which is the *gist* of the charge, and makes the offence, is the contemptuously not returning the warrants. And there was a case *Pasch. 16 Car. 2. Rex vers. the overseers of the poor of St. Clements, 1 Sid. 208. 1 Keb. 696. 697. 732. 749.* which comes up to this; where the defendants were indicted for not obeying an order of sessions; and exception was taken to the indictment, because there was no place laid where the order was made; and it was held to be good, because the neglect was the *gist* of the indictment, and the order was but inducement. But it is otherwise in cases of indictments for forging a deed at one place, and publishing it at another; the jury must come *de vicineto* of both places.

As for the power given in the act to the prosecutor to detain the person convicted in custody, till a return can be made to the warrant of distress; from whence it is inferred, that the prosecutor is also to execute the warrant of distress; that seems to me to be nothing to the purpose.

Pouys justice for the queen: it is requisite there should be a return made of the warrant, that the justice of peace may know what is done upon it. First, because of dividing the money levied as the act directs, which is to be directed by the justice. Secondly, because if there be not sufficient distress to be had, there is to be another punishment inflicted, in the nature of a second judgment, *viz.* imprisonment for a year, and the pillory. Thirdly, the act of parliament directs the offender to be kept in custody, during such reasonable time as a return may be had to the warrant of distress; which shews the act intended the warrant should be returned: and the return of the warrant is part of the execution of it. And a constable refusing to execute a warrant of a justice of peace, is indictable. And so is *2 Rel. Rep. 78.*

As to the objection, that the constable is not obliged to execute this warrant; it was intended by the act of parliament that the constable should execute it. For the money being to be levied by warrant under the hand of the justice, and it not being said in the act who should execute the warrant, the constable must execute it, who is the proper officer attendant on the justices of peace. And besides there are several things appointed in the act of parliament to be

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be done by the constables; as detaining the offender in custody, till a return may be made to the warrants, *sect.* 4. searching for venison, skins of deer, and toils, *sect.* 3. which shews that the law-makers looked upon him as the proper person in this case. And as to the objection, that it may as well be the prosecutor, because power is given to him by *sect.* 4. to detain the offender till a return may be made of the warrant; I answer, that he is only named for that particular purpose.

As to the objection of the want of *prout patet per recordum*, that is but inducement, and the *gist* of the offence is, the not returning the warrant. As to the objection, that there is a mis-trial, I think this is the very best place from whence the jury could come, it being the place where the warrant was delivered, which is the place which has the nearest relation to the offence. Also this indictment is for a *nonfeasance*, and therefore any place may be laid, it is not material what; but the place that is laid here is as right as can be. Also it would have been good, if it had been, that he refused generally, without any place.

Powell justice for the queen. The question is, if this be a good indictment, and I hold it is; a neglect of duty in an officer is indictable at common law, and this is an indictment at common law. And that takes away the exceptions to the indictment from the statute. For this is no otherwise an indictment upon the statute, than that the statute makes it the constable's duty to execute the warrant.

(a) Acc. Cro.
Eliz. 375.

Justices cannot
command the
sheriff without
special power
given them.

But it is objected, that the executing of this warrant is not made part of the constable's duty by this statute. But to this I answer, that constables are known officers to justices of peace. And if an act of parliament says, a justice of peace shall grant a warrant; of consequence of law it must be to the constable. Constables were officers at common law, they were conservators of the peace for things within their view, and some held they might take a bond. But they (a) are not judges of record. But ever since justices of the peace have been erected, constables have been their officers, and constant experience is so. Secondly, justices of peace cannot command the sheriff, unless power is given them so to do in the act of parliament. And that supposal, that the party should execute the warrant is harsh; for that is a practice never known in the law, but it must be done by the usual officer. And I believe there are many acts of parliament, which empower justices to grant warrants, that do not mention that they shall be directed to constables. If a jurisdiction of a new matter were given to this court by act of parliament, we must proceed in it according to our old forms. So justices must grant their warrants to their known officer. My lord Coke, 4 Inst. 267, says a

says, that a constable of a hundred was not an officer at common law, but created by the statute of *Winchester*, 13 Ed. 1. st. 2. c. 6. But I hold that he was an officer at common law, and the statute of *Winchester* only enlarged his authority in some particulars. And so it was held by my lord chief justice *Hale*, in the case of *Rex versus King*, 3 Keb. 197. 230. And the case of *The King vers. Samois*, Hil. 16 & 17 Jac. cited for it. And the new authority, which was given them by the statute of *Winchester*, was what occasioned the mistake. And so they are officers of the peace, and officers to the justices of peace, where no particular officer is named.

The convictions are but inducement, and therefore they may be pleaded without *prout patet per recordum*; the gist of the offence is the not returning the warrant. And there are many cases, that where a matter of record, which is alleged in pleading, is only introductory, it is not necessary to aver it by the record.

The warrant requires a return, so is the warrant itself expressly. And it is necessary on the frame of the act of parliament. For, as my brother *Powys* says, the offender is to be kept in custody, till a return may be had to the warrant; and for that reason the return ought to be speedy, that if there be sufficient distress, the offender might be delivered out of custody; or if not, the justice might proceed to give such farther judgment as the act directs. And in order to that, the justice ought to know what is done on the warrant.

It is objected, thirdly, that the *venire facias* ought to have been from all the places mentioned in the indictment. But as to this, the difference is, where the matter in issue arises in several places, there the *venue* must be from all the places. As where a prescription for a way from *A.* through *B.* to *C.* is in issue, the *venue* must be from *A. B.* and *C.* So where the appendancy of common in *A.* to lands in *B.* is traversed, the jury must come from both places. But though a matter arising in another place is necessary to be given in evidence, yet if the issue be not upon it, it is otherwise. And to that purpose is the case of *Clerk vers. Wood, Hutt.* 39. *Hob.* 305. 1 *Jones* 2. where the plaintiff declared, that he was seised in fee of a house in *D.* and that the defendant was seised in fee of seven acres of land in *D.* and that he and all those, &c. had had a way over the said seven acres to a place in *S.* and that the defendant had plowed up the seven acres, &c. and upon not guilty pleaded, the *venue* was from *D.* only, and it was resolved to be well; for not guilty being pleaded, the *tort* in plowing up the way is only in issue, though the right to the way must be proved upon the trial; and therefore the *venue* need be only from *D.* otherwise if the defendant had traversed the prescription. And the difference is, where the prescription is in issue, and where the *tort* only. As upon
a plea

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a plea of not guilty, 3 Cro. 619. *Sidenham vers. Robins*; an action for stopping a way; the same case, and the same difference. 3 Cro. 751. *Leeds vers. Shakerley*; an action upon the case for stopping his water-course to his mill, and the declaration of a water-course running by three *vills* *A. B. and C.* to his mill, and that the defendant stopped the water-course in *A.* and upon not guilty pleaded, the *verdict* was from *A.* only, and held well, the issue being not guilty; otherwise, if the issue had been upon the prescription. 2 Cro. 631. *Barbolt vers. Kent*, ravishment of ward; the plaintiff declared, that the ancestor of the ward held lands in *S. and T.* of the plaintiff, as of his manor of *S. &c.* and the defendant ravished the ward *apud S.* and upon not guilty pleaded, the *verdict* was from *S.* and assigned for error, because it ought to have been from the manor of *S.* or from that and *T.* but resolved to be well, not guilty being pleaded: for then the issue is upon the ravishment, which is laid at *S.* but otherwise if the issue had been upon the tenure, for then it should have been from the manor of *S. and T.* And yet in both those cases the tenure, and also the water-course, must be given in evidence; but the issue is directly upon the *tert.* and but incidentally upon the tenure, &c. But it is objected, that the *verdict* ought at least to have been from two of the places; *Fulpham*, where the warrant was delivered (and that place all agree it ought to come from, for that is the most material thing) and it ought to be also from *Walberton*, the place where the money was levied. But that I deny, for the matter of the money being levied might have been left out of the indictment, though it will be an aggravation of the fine, for the offence is not returning the warrant. And in case this had been an action to recover damages, this might have been an objection, because the jury ought to have inquired into the levying the money, in order to have enabled them to assess damages. But upon this indictment it was enough to prove a delivery of the warrant.

As to the objection, that there ought to have been a place expressed in the warrant, where it should be returned; that was not necessary, nor ever is inserted in any warrants. And if the justice was not to be found, that would have been a good excuse for the constable upon his defence; but we must presume he was in the way. If indictments will not lie in this case, the act of parliament will signify nothing.

Holt chief justice for the defendant: I make no question but an indictment will lie in this case, but I do not like this. The constable is a proper officer to execute the warrant; but that which sticks with me is, that there is neither time nor place mentioned in the warrant, when and where it should be returned; whereas there ought to be both: and all process in the superior courts are so. Must the constable seek the justice all over the county? Indeed
original

Original writs in this court are returnable *ubicunque*; but the sheriff is an officer to this court, and therefore must take notice where the court sits. But bills in this court have a place of return, and so has all process that issues out of the common pleas and exchequer. And it is reasonable for the justices of peace, who have but a special authority, to insert a place of return in their warrant.

2. The time when the warrant was returnable is not set out. All that is said is, that it was *ad certum diem longe abhinc præteritum*; but the certain time ought to have been set out, for it might be delivered after the return was out. It (a) is said, that *postea, scilicet*, the said second of September, it was delivered to the constable the defendant to be executed; but that is but evasive, for it might be delivered after, and also after the return was out, and it is not sufficiently laid, that it was otherwise. And if it was so, then the not returning it is no offence; for a man is not bound to execute a warrant, that is delivered to him after the return is out; for after the return is out, the warrant has lost its force. The indictment would have been better, if it had been for neglecting to execute the warrant, for if he had not paid every person their share, the defendant had not executed the warrant.

The case cited by my brother Gould of the King *vers.* the overseers of *St. Clement's*, was a plain case, because the non-execution was in the parish of *St. Clement's*. But there is no more reason in this case to say, the neglect was at *Felpham*, than at any place else.

As to what has been said about a high constable, though the case of *Sharrock v. Hannemer*, *Cro. Eliz.* 375. is, that a high constable cannot arrest a man for a breach of the peace within his view, for that he was not such an officer, nor conservator of the peace, whereof the common law takes any notice, for he is not mentioned in any book; yet that has been since contradicted in my lord Hale's time, *Mich.* 25 Car. 2. 3 *Keb.* 197. 230. And it has been held, that a high constable was an officer at common law, and had power to do all things, which a petty constable can do.

Judgment was given for the queen, by the opinion of the three *justiæ* judges.

Upon the former arguments of this case, the chief justice and Powell, and the court held, that in case an offender was but once convicted, and had goods only sufficient to satisfy part of the sum forfeited, that his goods could not be taken,

If a statute give a pecuniary penalty for an offence, to be levied by distress, and for want of

goods imposes a corporal punishment, and a party against whom there is a single conviction only, has goods sufficient to satisfy a part of the sum only, his goods ought not to be seized, but the corporal punishment should be inflicted upon him. *S. P.* 11 Mod. 54. Fort. 127, 128. 132.

But if there are two convictions against a man, and he has goods sufficient to satisfy one, and that only, they ought to be levied under one conviction, and the corporal punishment should be inflicted upon him under the other. *S. P.* 11 Mod. 54. Fort. 132.

(a) It seems, this is another good distinct objection, for it should have been *postea et ante returnum ejusdem*, for the time under the *scilicet* is not traversable.

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but he must be imprisoned for a year, and set in the pillory. But in case he were twice convicted, and had goods sufficient to satisfy one conviction, but not both, he should pay one, and suffer corporal punishment for the other. But the law never intended he should suffer both ways upon one conviction, to pay part, and be set in the pillory for the residue.

(a) Vide ante
545.

The chief justice said, that upon the return of want of distress, the (a) justice of peace should make a record of it, and give judgment for the corporal punishment.

The chief justice and *Powell* also held, that the constable was not obliged to return the warrant itself to the justice, but might keep that for his own justification, in case he should be questioned for what he had done; but only to give him an account what he had done upon it.

The chief justice held, that it was not necessary, to set out the convictions in the indictment at large, but only shortly, that such an one was before such and such justices convicted *secundum formam statuti*, et superinde a warrant was issued, &c.

Gerrard *vers.* Delaval.

In an action upon a bond until the condition appears the penalty shall be considered as the debt.

Vide ante 519.

AN action of debt upon a bond of 200*l.* the defendant, without craving *oyer* of the bond or condition, pleads that he was discharged by the act of poor prisoners 2 & 3 of this queen, *cap.* 16. The chief justice took the exception, that the condition of the bond not appearing, the whole 200*l.* must be taken to be a debt, and consequently the defendant not within the act of parliament (though in truth the bond was only for payment of 100*l.*) and for this reason judgment was given for the plaintiff by the whole court. For they could not take notice, but that the whole 200*l.* was a just debt to the plaintiff.

The chief justice said, that there were three sorts of discharges by this act. First, the original discharge by the justices of peace at sessions out of actual custody. Secondly, if a person so discharged was arrested again, there was a second discharge upon common bail. And a third, whereby the body of the debtor was exempted from being liable to be taken in execution. But that the (a) *proviso* extended to all these, that no person should have any benefit of any of them, that was indebted above the sum of 100*l.* principal money and damages.

(a) Vide ante
2088.

Powell justice said, that if the money in the condition was not paid at the day, the interest was damages.

* Note, this case was adjudged in *Michaelmas* term following, and inserted here by mistake.

Regina *vers.* Peirson.

S. C. Salk. 382.

A Writ of error of a judgment given at the sessions for the county of *Middlesex* at *Hickes's-hall* by the justices of peace there, upon an indictment, which sets forth, that the defendant such a day and year, and at divers other days, at such a place, *suit et adhuc est communis lena, Anglice* a common bawd, *et pro commodo et lucro suo proprio adtunc et ibidem quasdam male dispositas personas tam homines quam mulieres in diversis domibus lupanaribus convenire, scortationem et fornicationem committere, adtunc et ibidem illicito procuravit, in contemptum, &c.* To this indictment the defendant pleaded not guilty, and was convicted, and fined 100*l.* And the judgment was reversed; for the indictment ought to have been, for keeping a common bawdy-house. But what is charged in this indictment is but solicitation of chastity, which is a spiritual offence, and not inquirable or punishable at common law. And serjeant *Broderick* relied on the difference in 1 *Roll.* 44. n. 8, 9. where it is resolved, that for saying a woman is a bawd, no (a) action will lie at common law; otherwise, if you say she is a bawd, and keeps a bawdy-house; because that is an offence inquirable and punishable in a leet.

An indictment cannot be maintained against any one for being a bawd, and procuring ill-disposed persons to meet and commit fornication. 6 Mod. 178. 256. 311. 1 Sid. 282. Far. 52. 1 Lev. 299. For keeping a bawdy-house it may. R. acc. Salk. 384.

It was agreed both by the court and counsel in this case, that if a person was only a lodger in a house, yet if she made use of her room for the entertaining and accommodating people in the way of a bawdy-house, it would be keeping of a bawdy-house, as much as if she had the whole house. (b)

A lodger who uses her room to entertain and accommodate fornicators is to be considered as keeping a bawdy house.

(a) R. acc. Str. 1100. 10 Mod. 384. (b) D. acc. Str. 1100.

Regina *vers.* Weston.

THE defendant was adjudged by two justices of the peace, to be the father of a bastard child; and the order being removed into the king's bench by *certiorari*, several exceptions were taken to it.

If a statute authorises justices to make an order for the payment of money weekly, they

may direct the first payment to be made before the expiration of a week from the making of the order.

1. That the justices had ordered the weekly payments to be made upon a particular day, *viz.* every *Monday*, in

Whatever sums justices are empowered to order for the relief of the poor they may direct to be paid to the parish officers. S. C. Salk. 122. Holt. 107.

An adjudication by two justices in the singular number, as we doth adjudge, is void. S. C. Salk. 122. Holt. 107.

Vide Shaw's Parish Law. c. 37. s. 28.

G g 2

which

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v.
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Under a power
to make leases
reserving the
rent annually,
the rent may be
made payable
in the middle of
the year.

which they had gone beyond the power given them in the statute; for computing the time from the making of the order, the week was not up on the *Monday*. But *Holt* chief justice held that it was well, and if it was before the day the week was up, yet payment before the day was payment at the day. And *Powell* justice said, that if a man had a power to make leases reserving the ancient yearly rent annually, yet if it were reserved upon a day before the year was up, as if the year ended at *Christmas*, and it was reserved at *Michaelmas*, it would be well, pursuant to the power; which *Holt* agreed.

2. That the money was ordered to be paid to the overseers of the poor, whereas it ought to have been ordered to have been paid to the inhabitants of the parish generally. But *Holt* held it was well enough, and that if an order had been made before the 43 of *Eliz.* which constituted overseers of the poor, the justices of peace might have ordered the money to have been paid to two or three of the inhabitants of the parish, and so now they may order it to be paid to the overseers.

3. But the great objection which stuck long with the court was, that after the recital of the order when it came to the adjudication, it was, we the said justices *doth* adjudge, instead of *do*, the singular number for the plural. Mr. *Eyre* to maintain it cited *Fullwood's case*, 1 *Cro.* 489. where *F.* and others were indicted on the 3 *Hen. 7. c. 2.* for assaulting and taking a woman away by force and marrying her against her will; and the indictment was *cepit* instead of *ceperunt*; and notwithstanding that exception taken, yet judgment of death was given against the defendants. But *Holt* chief justice said, that the answer, which is reported in the book to have been given to the objection, is not adequate to it, and is so very odd, that he feared the reporter was mistaken, and ordered the roll to be searched; and upon searching, the roll was produced in court, and was *intr. Hil. 13 Car. 1. Rat. 24. inter placita coronæ*, and was not *cepit* as it was reported to be in the book, but *ceperunt*. And so that case being removed out of the way, after the case had depended two terms, and been several times stiered, the court for that exception the last day of the term quashed the order.

And afterwards the same justices made another order with the very same fault in it, viz. *Doth* adjudge, and upon a *certiorari* that was quashed, *Hil. 4 Annæ B. R.*

Michaelmas Term

4 Annæ reginæ, B. R. 1705.

Regina *vers.* Baines.

THE defendant was by order of sessions, for several gross misdemeanors, turned out from being clerk of the peace, and the order was removed into the Court by *certiorari*; and for several exceptions to the order the court were all of opinion to quash the order; when Mr. Attorney took an exception to the *certiorari*, because it was to remove *omnes ordines versus Baines et Atkinson nuper factos*, and the order removed was *versus Baines* only, and appeared to be made after the *teste* of the writ. And the court ordered counsel of both sides to speak to this point. And it was argued by Mr. *Weld* and Mr. *Broderick* for Mr. *Baines*; and by Mr. Attorney of the other side. It was said for *Baines*, that the words ought to be taken distributively; as if *B.* and *C.* release to *A.* all actions, which they have against *A.* it will release both joint actions, and also several ones: that these writs ought to have a liberal construction given them, because they are to inspect the proceedings of other courts: as upon a *certiorari* a cause entered, or an order made, or an indictment found, after the *teste* of the writ shall be removed. That there is a great deal of difference between a *certiorari* and a writ of error; for a *certiorari* is general, to remove *omnes ordines*, but a writ of error is tied up to such a particular record between such an one plaintiff, and such an one defendant, in such a plea; and therefore a writ of error of a judgment between *A.* plaintiff, and *B.* and *C.* defendants, will not remove a judgment in a suit between *A.* plaintiff and *B.* defendant: but a *certiorari* to remove *omnes ordines versus A. B. and C.* will remove all orders against any of them. And so is the case of the *King v. Lovet*, 3 *Keb.* 102, a *certiorari* to remove an indictment of force, unde *L. et T. indictati sunt*; and the court held, that that would remove an indictment against *L.* only; for they held, that a *certiorari* was joint and several, but otherwise of a writ of error, which would

A *certiorari* to remove all proceedings against two persons will not remove any proceedings against one of them alone.

S. C. *Salk.* 157.
R. acc. ante 609.

Q. Whether a *certiorari* to remove an order lately made will remove an order made after the *teste* of the *certiorari*.
Vide ante 836
post 1305.

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v.
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not remove a several indictment. And even in a writ of error, in the case of *Gay v. Adams*, 2 Saund. 291, 292. the writ of error was directed *majori et aldermannis civitatis suae B. ac majori et constabulariis stapulae B. necnon vicecomitibus ejusdem, ac ballivis majori et communitati ejusdem curiae Tolfel, ac ballivis et communitati curiae suae pedis pulverizati, et eorum cuilibet*, to certify a record of a judgment *loquela* quae fuit coram vobis in curia nostra civitatis praedictae sine brevi nostro, &c. and the record certified was, *placita in curia domini regis Tolfel civitatis praedictae, coram A. et B. tam vicecomitibus comitatus civitatis praedictae quam ballivis majore et communitate ejusdem civitatis, &c.* though the record certified was not before so many as the record described in the writ of error, yet it was held to be well, because the *coram vobis* should be taken *distributive*; as *coram* all the said officers, or any of them. So in the case of *Ord v. Morton*, Yelv. 211. the writ of error was of a judgment in ejectment before the bishop of Durham, and seven others by name; and the record certified was before the bishop and eight others: and the record was held to be well removed: for so the parties be right named, any other variance will not hurt. The case of the (a) *King v. Fossebrook*, ante 609. was, a *certiorari* to remove all orders against A. B. and C. and the case was, that there was a joint order against A. B. and C. and another against two of them, and another against one of them only; and it was resolved, that the joint order was only removed, and not the two last. But the reason of that resolution was, because the court took it, that the first was the only order was intended to be removed. Mr. Broderick urged farther, that there was a great deal of difference between writs of error and *certioraris*. For writs of error are to destroy the judgment, and therefore ought to be taken strictly; and therefore the cases of writs of error will be no rule to govern this case; that a writ of error can remove but one record, though there were many records that would answer the description, nay, though there were more that were the same *totidem verbis*: but that it was otherwise of *certioraris*. He said, that the case of *Fossebrook* was as it is cited; but that it was resolved by the three judges, *absente Holt* chief justice. 3 Keb. 102. was directly contrary, and so was 1 Roll. 395. Chaney's case, 37 & 38 Eliz. if a *certiorari* issues to remove an indictment of forcible entry against seven, naming them, where but four of them only are indicted, yet it ought to be removed. He said, that joint words in all mandatory or prohibitory writs are taken jointly and severally; as if a *mandamus* be to swear two persons duly elected, in (b) the return both their elections must be answered. He cited Yelv. 212. and remembered the difference there taken, between writs to remove a record, as *pones, recordares, &c.* and writs to defeat a record, as *writs* (c) This is the case reported ante 609, under the name of *Rex v. Brown*, et al'.
of

(b) R. acc. ante
309.

of error, and writs of false judgment. And cited the case of the *procedendo*, *Fitz. procedendo* 3. where the *procedendo* mentioned the assize to have been arraigned before two justices, and in truth it was arraigned before three, and yet good. And 3 Hen. 6. 2. *Bro. Recordare* 2. *Fitz. Replevin* 2. where a *pone* in a replevin was sued at the suit of the defendant, and the words were, *et dicas præfatos R.* the defendant, where it should have been *J.* the plaintiff; and well. For the plea shall not be held upon the *pone*, but upon the plaint. And it has not been seen, that a writ of *pone* or *recordare* has been abated, for they have lost their force, when the plea is removed. [But note, says *Brook*, that if the *pone* be between the plaintiff and a stranger, it is a void removing.] And in the principal case there the record is held to be well removed, though the judges cannot proceed to examine the errors. He said, that joint words should be construed severally, and cited the case in *Dier* 34. and *Moore* 164. *Beltingham's* case, where *W. B.* and *L. B.* are pardoned *omnia et omnimoda utlagaria versus præfatos W. et L. seu versus eorum alterum promulgata*; and though the words of the pardon were joint yet it was allowed; because it should be construed severally according to the subject matter, *scilicet*, felonies, which cannot be joint: but it should have been, *et eorum aliquem*. So the statute 13 Eliz. c. 1. makes it treason during the queen's life to say, that she is not, nor ought not to be, queen of this realm of *England*, and of the realms of *France* and *Ireland*: and yet where one said, that the queen was not queen of *France* nor of *Ireland*, saying nothing of *England*, it was resolved to be treason, notwithstanding the word *and*, which was taken as *or*. 1 *And.* 133. 2 *And.* 149.

Mr. Attorney General said, that Mr. *Broderick* agreed, that in case of a writ of error no other record could be removed, but only one that answered the description in the writ of error. Now a *certiorari* does not differ from a writ of error in reason, nor the nature of the thing; for upon this writ the record shall be examined. And the reason why this writ is brought is, because a writ of error does not lie upon an order of sessions; and the word *terminari* in this writ signifies only finally determined. And agreeable to this was the resolution of that case in the year 1700, cited by Mr. *Weld*. In that case, there was an indictment against all three, and another against two of them, and another against one of them only; and they were all removed up; but the court would proceed only on that against all three, which agreed with the description in the writ. As for Mr. *Weld's* reason of that case, because the court took it, that the joint indictment was the only one intended to be removed, that will not support the resolution; for if the writ be in its nature joint and several by construction of law,

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law, they must have been all removed, because the full import of the words of the writ must be answered; and it is not a matter of election, to return them all or part only, because the words of the writ upon that supposition are not satisfied by the return of part only. And the *certiorari* was, *omnia et singula indictamenta*. The constant form of *certioraris* is to make them joint and several, viz. *omnia et singula indictamenta* against *A.* and *B.* or either of them: and if what is contended for of the other side should take place, if there were a joint indictment or order against *A.* and *B.* and several indictments or orders against each of them, if one of them only should bring a *certiorari*, this would remove not only the several order or indictment against him, but the joint one against him and the other two. For, as I said before, it is not in the election of the officer, to return up one, and keep back the other. He said, the case of *Keble* was not against him; for that was only, that a *certiorari* might be joint and several, which a writ of error could not be; which I agree. But then there must be several words, as it must be intended there were in that case. The case in *Yelverton* he said was for him, but what would be a full answer to that case, and also to the case in *Saunders*, was, what was held in the case of lord *Cromwell v. Andrews*, *Yelv.* 6. that if the record is recited right in the writ of error in the names of the parties and the thing recovered, it would be sufficient to remove the record, though there were some variance in the judges in the number of them.

2. Another exception to the *certiorari* he said was, that it was *omnes ordines nuper factos*, which tied it up to orders made before that time; and this order returned up was made after the *teste* of the writ. And these provisional *certioraris* ought to be worded generally, *factos*.

Mr. *Weld* answered to this exception, that it was resolved to be well in the case of *Crosse v. Smith*, ante 836. where the *certiorari* was to remove a plaint *tunc nuper levatam*, and yet held, that it would remove a plaint levied between the *teste* and return of the *certiorari*.

Upon the first speaking to the case in *Michaëlmas* term 3^d the chief justice said, that a writ of error was only of one judgment, but a *certiorari* might affect more orders or indictments.

Powell. What is the meaning of putting in the words, or either of them, in these writs of *certiorari*? In that case cited out of *Saunders* the court went much upon the constant form of writs to that court, which had always gone that

that way: and I heard chief justice *Saunders* say so. To which the chief justice said, it would be hard to maintain that judgment otherwise.

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Upon the second argument of this case in *Hil. 3^o* *Holt* chief justice said, that the *certiorari* was to remove all orders against *Atkinson* and *Baines*; and that there was no order against *A.* and *B.* but only against *B.* If a man brings an *assumpsit* against *A.* and *B.* upon the promise of both, and upon evidence it appears to have been the promise of one of them only, the plaintiff cannot recover; for always when two persons are named, it is understood of them jointly, unless it be said, *or any of them*: but it is joint in common parlance. As to the case of a pardon to *A.* and *B.* of all offences whereof *A.* and *B.* are indicted, that must be taken severally from the nature of the thing; because the offences are several, and consequently so must the operation of the pardon be. A man may have one prohibition to several suits, but then it must appear so in the writ. So a man may have one *certiorari* to remove several indictments, but then the writ must mention several indictments. And here the justices of peace cannot certify indictments or orders made by them into this court, without a writ of *certiorari*, as justices of *oyer and terminer* may; and therefore the removal of this order, whether removed or not, depends upon the efficacy of the writ.

Powell. I thought you would have searched for the writ in that case in *Kebble*; for notwithstanding any thing that is said in that book, the writ in that case might be joint and several. And *Holt* said, that where a report of a case is doubtful, it ought to be verified by the record.

Powell. How do you answer the case of the *King vers. Fossebrook*? *Ante* 609.

Afterwards in *Mich. 4.* the *certiorari* was quashed, because it was not sufficient to remove these several orders; and a new writ granted: but it was agreed to be a good writ, to remove a joint order against *A.* and *B.*

Holt chief justice said upon one of the arguments of this case, that the justices of peace had best have a care, of making the order they should return different from the record,

Intr. Mich. 3
Ann. B. R.
Rot. 304.

Hyde qui tam, &c. *vers.* Partridge.

Q. Whether the statute of limitations of the 21 Jac. 1. c. 16. extends to suits in the admiralty for mariners' wages. S. C. Salk. 424. 3 Salk. 227. Holt 428. with some difference 11 Mod. 43. acc. ante 934. nunc vid. 4 Ann. c. 16. s. 17. 18. If it does, a plea there that the contract was made ten years before the commencement of the suit, is bad. Vide ante 838. 934.

THE case was, a suit commenced in the admiralty court for seamen's wages, and the defendant below pleaded the statute 21 Jac. of limitations, and that the contract was made above ten years before the suit commenced; and the judge below over-ruled the plea. And the defendant below moved for a prohibition, for refusing the plea; and the court granted it, with a direction to declare upon it; that the matter might come judicially in question; which was accordingly done, and the case put into a declaration; and upon a demurrer to it, the case was several times argued. And when it stood for the resolution of the court, Holt chief justice took an exception to the plea below, that it was said, that the contract was made above ten years before the suit commenced, which was not material; for the cause of action did not accrue by the contract, but by the determination of the voyage, and it did not appear when that was; for that might have been within six years before the suit commenced, though the contract was made so long before; and wages are not due till the determination of the voyage, whensoever the contract is made. And therefore the plea ought to have been, that the voyage determined above six years before the suit commenced. And for this fault, if this plea had been pleaded to an action brought here, we should have over-ruled it; and consequently they below have done well in over-ruling it, and therefore a consultation must be granted; else the matter were considerable.

Powell. This exception is fatal, for your prohibition is founded upon the judge of the admiralty's refusing to allow your plea, which was no more than he ought to do, for that fault in it.

And a consultation was granted upon this point *per totam curiam*. But note, that the court inclined, that a consultation should be granted on the merits. For Holt said, that if a contract is made on the high sea, this statute cannot be pleaded in the admiralty to a suit there for it, because they have original jurisdiction of the cause, and are not within the act. And by usage immemorial they have sued in the admiralty for mariners wages, though the contract was at land; and the statute seems by the penning, to be aimed only against suits at common law.

Bond *vers.* Barnes.

Record post Vol. 3. p. 52.

THE defendant pleaded another action pendent in abatement, and began his plea thus, *viz. petit judicium de narratione*, and concluded it thus, *unde petit judicium de narratione pro eadem causa pendente, et quod narratio cassetur*: and upon demurrer Mr. Branthwayte prayed judgment final, upon the authority of the case of *Medina vers. Stoughton*, Trin. 12 Will. 3. B. R. ante 593. where he alleged, it had been resolved, that the commencement and conclusion to the declaration was in bar, in this court. And the court, *absente Holt*, held it to be in bar, and gave judgment final upon the first opening.

In an action by bill a plea which prays judgment of the declaration, and that the same may be qualified is to be considered as a plea in bar. R. acc. post 1460. Vide 3 Bl. Com. 303. Moffatt v. Van Millingen. B. R. H. 27 G. 3.

But it seems, that it was only a plea in abatement; and no such matter was resolved in the case cited, but the contrary; and the judgment was only a *respondes ouster* in that case.

Misnomer was pleaded in the same manner as before in the case of *North vers. Baker* this term; and judgment final given the last paper day, when the court was full, upon the opening of the case, and the manner of the plea. But it was not opposed, there being no counsel for the defendant.

Colefatt *vers.* Newcomb.

A Minister of a donative was sued in the ecclesiastical court, for that when he read prayers, he did read not the whole service, but left out what parts of it he thought fit; and for preaching without licence. And Mr. King moved for a prohibition, upon a suggestion that the church was a donative; and he argued, that donatives were exempt from the jurisdiction of the ordinary, and that it was a lay thing, and the bishop could not visit it; and that if the incumbent was guilty of heresy, the ordinary could not meddle with him, for the parson was privileged in respect of the place; but the patron might by commission examine the matter, and upon cause deprive him. *Yelv.* 61, 62. *Fairchild vers. Gajre*, 2 Cro. 63. S. C. and Co. Lit. 344. a. that the founder shall visit them; and *Bro. Praemunire* 21, to the same purpose.

The spiritual court cannot deprive the parson of a donative. R. acc. 7 Mod. 31. D. acc. 12 Mod. 641. But they may punish him for any misconduct as parson. R. acc. 12 Mod. 640. 7 Mod. 31. D. acc. 3 Salk. 140. As for omitting part of the liturgy. Or preaching

ing without licence. R. acc. 12 Mod. 640. Semb. cont. 3 Salk. 141. 3 Wils. 361.

But *Powell*, *absente Holt*, took the difference; where the suit in the ecclesiastical court is in order to deprivation, and where only for reformation of manners; in the first case the court will prohibit, but not in the last; and therefore, if in

this

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v.
NEWCOMB.

A mandamus
lies to compel a
bishop to grant a
licence to preach
to a parson who
is properly qual-
ified.

this case the spiritual court proceeded to deprivation, the court would prohibit them, but not till then. He said, he had known prohibitions denied frequently to suits against parsons of donatives for marrying without licence. He said, that by the old canon law preaching was no part of the minister's office, however it came to be so much in vogue now; but only reading mass, and administering the sacraments; and no body preached then without licence of the bishop, but he appointed preachers. And he said, that now since the act of uniformity, 1 Eliz. c. 2. if the bishop denied to grant a licence to a parson, who was fit to preach, they would grant a *mandamus* to him to grant one, and that by the act of uniformity the ecclesiastical jurisdiction was saved. And the motion was denied.

Note, Mr. Mead and Mr. Salkeld, both of the *Middle Temple*, told me, they had both known the chief justice take the same distinction, that the parson of a donative was liable to the ecclesiastical jurisdiction, as he was a member of the ecclesiastical body, for personal offences, though for matters relating to the church he was exempt and therefore the spiritual court could not deprive him: but for drunkenness, or preaching heresy, they might censure him; and that seems upon consideration of the case in *Yelverton* to be the better opinion.

Bens *vers.* Parre.

Mariners may
sue for their
wages in the
court of admir-
alty, notwith-
standing they let
themselves by a
written contract
made at land.
Vide ante 577.
Salk. 31. pl. 1.
Str. 963. Burr.
1944. 3 Lev. 60.

SIR James Mountague moved for a prohibition to a suit in the admiralty for seamen's wages, upon a suggestion that the contract was made by deed at land. But upon reading the suggestion it appeared to be general, that the contract was made at land. Then the court directed him to mend his suggestion, and make it, that it was by deed. And he amended it, and made it *per scriptum*. But the court held, that that (a) was not sufficient, for it might be by writing, and yet not by deed; and if it were so, that would not alter the case, for notwithstanding the writing, it is but a *parol* contract. But Sir James Mountague urged, that it was a special agreement, but that the court held did not draw it from the admiralty's jurisdiction. And the motion was denied.

(a) Vide post 1536.

Hackett *vers.* Tilly.

THE plaintiff brought an action of debt against the defendant on a bond of 2000*l.* entered into by the defendant to *Thomas Fox* Esq; deceased; and this was brought by the plaintiff as administrator to the said *Thomas Fox* as to this bond only, in trust for Sir *Andrew Hackett*. The bond bore date the 20th of *May* 1695. The administration was laid to be granted by the archbishop to the plaintiff the 14th of *May* 1705. The defendant, after an imparlance *with salvo sibi omnibus et omnimodis exceptionibus ad billam prædictam* prayed *oyer* of the bond and condition. The bond appeared to be entered into to the said *Thomas Fox*, as warden of the *Fleet* prison; and the condition was, if the defendant do, some time within the space of two years next ensuing the date hereof, indemnify and save harmless the said *Thomas Fox* from all actions, that are already brought against the said *Thomas Fox*, for the escape of any prisoners, that have escaped out of the *Fleet* prison, then the obligation to be void, &c. Then the defendant prayed *oyer* of the plaintiff's letters of administration, and had it; and then pleaded in abatement, that this bond was at the time of the making, and yet is, a security entered into to the said *Thomas Fox*, as warden of the *Fleet* prison, and relating to the said office of warden of the *Fleet*; and that before the granting the said administration to the plaintiff, the archbishop, the 6th of *February* 1704, granted letters of administration *bonorum jurium et creditorum dicti Thomae Fox defuncti, quoad et quatenus omnia redditus pro cameris debita et securitates per obligationes judicia sive aliter quomodocunque tunc intratas dicto Thomas Fox, ut guardianus de le Fleet, ac etiam tota beneficia advantagia summam et summas monetæ, quæ obtineri poterint ea ratione de et ab aliqua persona sive aliquibus personis quibuscunque et omnia beneficia exinde habenda, cuidam Johanni Clements, &c. prout, &c.* and then he avers, that *John Clements* took on him the administration, and is alive, and those letters of administration in full force, &c. To which plea the plaintiff demurred. And exception was took to it by Mr. *Pengelly*, that this was matter in bar, and could not be pleaded in abatement, because it perfectly destroys all right of action in the plaintiff; whereas in a plea in abatement, the (a) defendant ought always to give the plaintiff a better writ: and the difference is, where it is pleaded in the plaintiff or defendant himself, or in a stranger; as if the suit is against the defendant as executor, the defendant pleads, that *J. S.* died intestate, and administration was granted to him, this is no bar, but pleadable only in abatement. 2 *Lev.* 190. *Granwell v. Selby*, 2 *Cro.* 15. But where the plea is, that a stranger is

In an action by an administrator the defendant cannot plead a prior grant of administration to a third person in abatement. Vide ante 345. 693. post. 1249.

But he may in bar.

(a) R. sec. ante 1178. and see the books there cited.

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TILLY.

executor or administrator, it is a bar. *Dier* 202, p. 69. 5 Co. *Robinson's* case. And all these books, viz. 21 H. 6. n. 18. 1 *Brownl.* 97. *Yelv.* 115. 7 H. 6. 13. 3 H. 7. 14. 4 H. 7. 17. 31 H. 6. 13. 9 H. 6. 7. *Cro. El.* 102. 2 *Roll.* 3, 20. warrant this difference. See *Cro. El.* 111.

Against which Mr. *Raymond* urged for the defendant, that though this might be pleaded in bar, (which he admitted) yet it might be pleaded in abatement too; and that there were several cases in the books, where it was held, that matter in bar might be pleaded in abatement. 10 H. 7. 11. *Br. Brief* 543. If a man pleads a plea in abatement, and he cannot come to the matter which goes in abatement, without shewing the matter in bar, the plea in abatement should be took, as outlawry. So in waste in the *tenet*, I may plead a surrender in abatement, and yet that is a bar. So in replevin, property in a stranger may be pleaded in bar or abatement. 2 *Roll.* 2. 64. *Cro. Jac.* 519. *Salkill v. Skelton*, *Winch* 26. *Hill.* 31 H. 6. 12. b. pl. 1. 1 *Ventr.* 249. *Wildman v. Norton*. *Hale* chief justice said, property in the defendant may be pleaded in bar or abatement. 2 *Mod.* 214. *Major & Stebbing v. Bird & Harrison.* 34 H. 6. 1. Receipt of part of the debt is pleadable in abatement, yet it may be pleaded in bar.

But *per totam curiam*, the plea is only in bar, and cannot be pleaded in abatement, for the reasons mentioned by *Pengelly*; and therefore a *respondes ouster* was awarded.

Plea in abatement after imparlance. Vide *Bl.* 51. r094.

(a) R. acc. Str. 532.

Note, this plea was pleaded, after imparlance. See for that 3 *Lev.* 330. 2 *Lutw.* 963. *Hunlock v. Petre*, general non-tenure pleaded after special imparlance; otherwise after general imparlance, 3 *Lev.* 55. But see that record 53. that it is a special imparlance. Privilege (a) is not pleadable after special imparlance. 1 *Sid.* 318. *Trussell v. Maddin.* 22 H. 6. 7.

Newton & Uxor vers. Hatter.

Husband and wife cannot join in an action for a battery on them both. Acc. 1 *Roll.* Abr. 782. pl. 2. l. 10.

THE plaintiffs brought an action of assault and battery, for a battery committed on them both; judgment by default, and a writ of enquiry was executed 17 of May 1705, and intire damages, viz. 7 l. 10 s. was given. And on the return of the writ of inquiry judgment was arrested, because the wife cannot be joined in an action with the husband for a battery on the husband, *Easter* term last. After which they brought a new action, only for the

In an action by husband and wife for a battery on the wife, the damnum must be made to apply to both.

battery

battery committed on the wife, and laid it *ad damnum ipsius Johannis* the husband. On not guilty pleaded, verdict was given for the plaintiff. And Mr. *Ketelby* moved in arrest of judgment, because it ought to have been *ad damnum ipsorum*, the damages in such case surviving to the wife, if the husband dies before they are received; and cited 1 *Sid.* 387. *Hoffin v. Byls.* And of that opinion was the court. And Mr. *Raymond* moved to arrest their own judgment for expedition.

NEWTON

v.
HATTEB.Gravelly *vers.* Ford.

THE plaintiff brought an action of *trover* against the defendant *de duobus equis*, and on not guilty pleaded, the issue was tried before the lord chief justice *Holt*, last summer assizes at *Horsham* in *Suffex*. And on evidence it appeared, that they were geldings: whereon Mr. *Conyers* counsel for the defendant insisted, that the plaintiff ought to be nonsuited for this variance; he having declared *de duobus equis*, whereas he ought to have declared *de duobus spadonibus*. And on the importunity of the defendant's counsel, the chief justice ordered the jury to give a verdict for the plaintiff; and he saved this as a point, but strongly inclined for the plaintiff. Afterwards, after *Michaelmas* term, 49, viz. Dec. 10, 1705, Mr. serjeant *Hall* attended the chief justice at his chamber in *Serjeant's Inn* in *Chancery-lane*, for the defendant; and Mr. *Raymond* attended for the plaintiff. And serjeant *Hall* cited *Lutw.* 1354. *Mellor v. Borking*, trespass for taking *vaccam*; the defendant justified the seizure *de una juvenca*, and though in other respects the justification was good, judgment for the plaintiff. But the chief justice held it clearly good, and said it was the same species, and that *spado* did not signify a gelding any more than any other creature gelt; and that in trespass for a trespass done *cum equis, bobus, vaccis, &c.* evidence of a trespass with geldings maintained the declaration; and therefore ordered the *posse* to be delivered to the plaintiff without any difficulty. Note, if the writ contains less than the count, it is ill; as if the writ is, *Quare clausum frigit*, and the declaration, *Quare clausa, &c.* *Cro. El.* 185. *Edwards v. Watkins*. So if (a) the writ contains more than the count; as replevin *de averiis*, declaration of a horse, *Cro. El.* 330. *Hastop v. Chaplin*. So in *Lutw.* 1181. *Gins v. Dams*, 2 *Ventr.* 153. *Cro. El.* 829. *Norton v. Palmer*. See 2 *Lutw.* 1537, 8. *Aden v. Harris*.

A gelding is a horse.

Evidence of the trover and conversion of a gelding will support a count in trover for a horse.

(a) R. acc. ante 4. sed vide 5 G. 1. c. 13. f. 1.

Mich 3 Ann.
B. R. n. 26.

An indictment
for a riot must
shew explicitly
for what act the
rioters assembled.
Vide 1 Hawk. c.
65. f. 2. ante
965.

An allegation
that they as-
sembled to do
something un-
lawful is insuf-
ficient.

Regina *vers.* Gulston, Stubbs, et alios.

THE defendants were indicted at the general quarter sessions of the peace held for the county of Norfolk 18 of July 1704 by adjournment, for that they the 25th of May 1704 *vi et armis, viz. gladiis baculis et cultellis*, apud East Bradenham in comitatu praedicto, riotose et routose seipsos congregaverunt et assemblerunt cum intentione ad aliquid illicitum ibidem agendum et perpetrandum, et pacem dicte dominae reginae perturbandum; et sic assembleti existentes ad quendam locum in East Bradenham praedicto, in venella, Anglice the lane, ibidem ducente ab East Bradenham praedicto ad S. in comitatu praedicto, quo quoddam quercus Edw. Beagham armigeri ad valentiam 100s. adunc stetit et crevit, riotose et routose accesserunt, et quercum illud ipsius E. B. *vi et armis, &c.* riotose, routose, illicito, et manu forti, succiderunt et prostraverunt; in malum exemplum, &c. In Trinity term last Mr. serjeant Weld moved, this indictment might be quashed, because to make it a riot, it ought to be shewn what unlawful act they assembled to do, and it was too general to say, *quoddam illicitum agendum*. Secondly, it was perfectly false Latin, *quoddam quercus, et quercum illud*; so that it does not appear any oak grew there at all. And the court made a rule to shew cause this term, &c. Whereupon Mr. Raymond urged, 1. That it was not necessary to shew what unlawful act they assembled to do, so that they did assemble to do an unlawful act; for if they assembled to do one, and did another, it would be a riot. 2. It appeared they did do an unlawful act, for they cut down an oak, and the false Latin could vitiate. *Sed non allocatur*; for *per curiam*, it is too general, and the act ought to be shewn, that the court might judge, whether the act was unlawful or not. Besides, they said they would not encourage such ill-drawn indictments, &c. and therefore it was quashed.

Pond *vers.* Underwood.

An executor cannot maintain an action for money had and received against a person who collected the debts of the testator under an authority from a person appointed administrator before the will was found, and paid then over to the administrator. R. cont. Salk. 27. pl. 14. vide Barr. 1984. Cowp. 565. 806.

IN an *indebitatus assumpsit* brought by the plaintiff Armuall Pond as executor of Charles Pond deceased, for money received by the defendant, owing to the testator for wages (he being a seaman) after the testator's death. On not guilty pleaded, it appeared on evidence at the trial, that before the will was found, administration, &c. was granted to Anne Pond a sister of Charles Pond, and that she made a warrant of attorney to the defendant to receive

this

this money, being 21*l*. by virtue of which warrant he did receive it, and paid it to *Anne* before any notice given of this will. And by the direction of the lord chief justice *Holt*, before whom it was tried at *Guildhall* the sittings after *Michaelmas* term 1705, the plaintiff was nonsuited: for by him, though all acts done by an administrator, where there is a will are void, and such an action in this case would lie against *Anne Pond*; yet it is hard to make the defendant liable, having paid the money over, before he knew of the will, to the administrator.

POND
v.
UNDERWOOD.

Burdett *vers.* Newell.

A Rule was made to shew cause why a prohibition should not be granted to stay a suit against the plaintiff, in the court of the archdeacon of *Litchfield*, for not going to his parish church, nor any other church, on *Sundays* or holidays, nor receiving the sacrament thrice a year: upon suggestion of the statute of *Eliz.* and the toleration act, 1 *W. & M. c.* 18. and then qualifying himself within that act, and alledging that he pleaded it below, and they refused to receive his plea. And Mr. *Raymond* shewed for cause, that this fact was false, and that the plaintiff was not a dissenter, nor had qualified himself *ut supra*, and therefore hoped the court would not allow the rule to stand, unless he had an *affidavit* of the fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction. *Quod curia concessit*, and therefore the rule was discharged. Mr. *Garter* counsel for the plaintiff having no *affidavit*.

On moving for a prohibition to the spiritual court for refusing a plea, the party ought to offer an affidavit of the truth of the facts in the plea.

Wiggins *vers.* Ingleton.

IN an action brought for mariners wages for a voyage from *Carolina* to *London*, it appeared, that the plaintiff served three or four months, and before the ship came to *London*, which was the delivering port, he was impressed into the queen's service; and afterwards the ship arrived at the delivering port. And ruled by *Holt*, on evidence at *Guildhall*, that the plaintiff should recover *pro tanto* as he served, the ship coming safe to the delivering port. Afterwards in another cause, the sittings after this term at *Guildhall* between *Chandler* and *Meade*, in such an action it appeared, that the plaintiff was hired by the defendant at *Carolina* to serve on board the *Jane* sloop, whereof the defendant was master, from *Carolina* to *England*, at 3*l*. per month: that he served two months, then the ship was took by a *French* privateer and ransomed; and just as she came off of *Plymouth*, the plaintiff was impressed, &c. and then the

A mariner who is impressed upon his voyage shall recover wages for the part of the voyage he had performed before he was pressed, if the ship out of which he was pressed arrives at her delivering port.

If a ship is captured tho' she may be ransomed afterwards, the mariners lose their wages.

WIGGINS
v.
INGLETON.

ship came safe into the river of *Thames*, where she disposed of her cargo: and by *Holt*, the plaintiff can have no wages; the ship having been took by the enemy and ransomed. Mr. *Raymond* insisted, that in that case he should recover *pro rata*, and that the usage among merchants was so; which *Holt* said, if he could prove, it would do; but wanting proof of it, the plaintiff was nonsuited.

Maitland vers. Taylor.

Vide ante 330.
12 Mod. 7. 1
Vent. 22. T.
Jon. 82. 1 Sid.
325. 1 Lev. 207.
3 Keb. 654. 675.
691. post 1214.

AN action was brought in *Middlesex* on an obligation, the condition was to pay a sum of money at such a place in *London*. The defendant, after oyer of the bond and condition, pleaded payment at the day, &c. And on issue joined, it was tried in *Middlesex* before the lord chief justice *Holt*, and verdict for the plaintiff. And the last day of the term Mr. *Harris* moved in arrest of judgment, that this ought to have been tried in *London*. But held, that according to the case of *Croft and Boite* in 1 *Saund.* 246. and *Jew v. Brigs.* 3 *Lev.* 394. and *Dame Calverley v. Leving,* ante 330. it was aided after verdict; by the judges *Powell, Powys,* and *Gould*, *Holt* being absent.

Tyson vers. Paske.

A sheriff may maintain an action for his poundage on an execution. S. C. Salk. 209. 333. Holt 318.

A sheriff is intitled to poundage for executing an *elegit*. S. C. Salk. 209. 333. Holt. 318.

In an action for such poundage, tho' the declaration does not shew that the place where the writ was executed was within the sheriff's bailiwick, the court will after a verdict for the sheriff presume that it was.

AN action of debt was brought by the sheriff of *Cambridgehire*, upon the 29 *Eliz. c. 4.* for his fees for executing an *elegit*; and upon *nil debet* pleaded, there was a verdict for the plaintiff. And Mr. *Page* and Mr. serjeant *Chesbire* took several exceptions in arrest of judgment. First, that no fees were due for executing an *elegit* within the statute, and consequently that the action lay not; for the land extended may be of little value, and therefore it is unreasonable that the sheriff should have poundage of the whole debt. And where the land lies in several counties, a man may pay more in fees than his debt. And the case of *Bridge and Cage*, 2 *Cro.* 103. was cited: an *assumpsit*, in consideration that the plaintiff would execute a writ of *elegit* for a friend of the defendant's, to pay, &c. and held, that no action would lie, though the money promised to be paid was no more than his shilling pence came to. In answer to this exception serjeant *Parker* cited the case of *Spring v. Eedes*, which was intr. *Hil.* 28 & 29 *Car.* 2. C. B. *Rot.* 1410. where in the very same action judgment was given for the plaintiff, and that judgment affirmed in the king's bench, the record of which assurance is *Hil.* 29 & 30 *Car.* 2. B. R. *Rot.* 386. As to the objection, where the land should happen to lie in several counties,

No objection can be made after a verdict on account of the want of a venue.

there

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there was nothing of that in the present case. The reason of the case in 2 *Croke* he said was, because in that time the judges held no action would lie upon the statute; but that has been held otherwise since. 1 *Cro.* 286, 287. *Jones* 307. where actions are maintained by sheriffs for fees for executing *capias ad satisfaciendum*.

Holt chief justice said, that there was no reason why the sheriff should not have fees, as well for executing an *elegit*, as an extent upon a statute. Upon the writ of *elegit*, the sheriff returns, that he has taken an inquisition, and extended the defendant's land, and delivered it to the plaintiff. And there is a *liberate* in the body of the writ of *elegit*, otherwise in case of an extent upon a statute there must be a *liberate*. And in the case of the *elegit*, upon the return of delivery, the plaintiff may enter; and he can do no more in case of a statute after a *liberate* executed, for he must not enter by force. The return of *liberari feci* is a full execution of the writ of *elegit*, and by that the plaintiff becomes tenant by *elegit*, and may maintain an ejectment; and he may enter and assign his interest upon the land, and the assignment will be good. For the defendant's continuing in possession after the return of the writ, turns the plaintiff's estate to a right, and therefore he must enter before he can assign it over.

Powell justice said, that the like case with this was adjudged in the common pleas, while he sat there; that all the objections, that are here made to the action, were made there, and over-ruled: that the court there resolved, that the statute of *Eliz.* mentioning extents, that should not be confined to extents upon statutes only, but should be carried to extents upon *elegits*, especially when they were both equally liable to the same exceptions. As to the objection how it should be, when several *elegits* were to go into several counties, they said, they would give their resolution in that, when it came in question; and therefore he was of opinion, that the sheriff should have his fees for executing an *elegit*. The other two judges agreed.

The second exception, and which was the only one that stuck with the court, was, that the plaintiff had laid in his declaration, that the inquisition was taken *apud villam Cantabrigiæ prædictæ*; and there was no *Cambridge* mentioned before. And this objection was enforced two ways: first, that there was no *venue* where this fact, which was so material, and the very ground and foundation of the action was done: Secondly, that it did not appear, that this inquisition was taken within the county of *Cambridge*, as it ought to do, to intitle the plaintiff to his action. For, as *Powell* justice said, there are more towns in *England* of

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that

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that name besides that where the university is, and for ought appears it might be one of them, where this inquisition was taken, and consequently out of the county, and so the execution void, and consequently the plaintiff has no cause of action.

After consideration as to the first part of the objection, it was resolved by Holt chief justice (to which the others agreed) that this was helped after verdict by the statute 17 Car. 2. c. 8. as no *venue*, the cause having been tried by a jury of the proper county. And he compared it to the case in 1 Lev. 207. upon an issue joined in an action of covenant, whether J. S. had any title to *Sbrob-walk* in the forest of *Whittlewood* in the county of *Northampton*: the action was laid in *London*, and the *venire facias* was from *Sbrob-walk*. And though it was agreed, that a walk in a forest was but a liberty, and no place from which a *venue* could arise, yet this want of a *venue* was aided by the (a) 17 Car. 2. the issue having been tried by a jury of the county, where the matter in issue arose. As to the second it was answered by the counsel for the plaintiff, and resolved by the court, that that was helped by the verdict, for the issue being upon *nil debet*, if the *elegit* had been executed out of *Cambridgeshire* it had been a void execution, and consequently against the plaintiff, and the jury must have found for the defendant, *quod nil debet*. And therefore a verdict being now found for the plaintiff, it must be intended that *Cambridge* is in the county of *Cambridge*; for it must be intended that a record was given in evidence of an inquisition taken within the county of *Cambridge*.

Judgment was given for the plaintiff.

(a) Note, this statute has been confined since to the letter, viz. county where the action is laid; but that is not this case, because the action here is laid in the proper county, and tried there also, and so within both the letter and meaning of the statute. Note to the 1st. edition, vide ante 330. 1212. and the cases there cited.

Intr. Mich. 1
Ann. B. R.
Rot. 170.

Billings *vers.* Eeds.

S. C. Salk. 612.

A man may let a coachman and horses without having a licence from the commissioners of hackney coaches.

UPON a special verdict in an action of trespass for taking the plaintiff's horses, the case was, a gentleman here in town had a chariot and harness of his own, and contracted with the plaintiff to furnish him with a pair of horses and a coachman whenever he should have occasion, and paid him for it 100*l.* per annum. But the plaintiff had no licence from the commissioners of hackney coaches to keep hackney coaches. And whether any person could let coach horses here in town to a gentleman, to drive him about town, except he had a licence to keep a hackney coach, was the question upon the 5 W. & M. c. 22. And the case was argued by Darnall king's serjeant, and Mr. attorney general for the defendant, but manifestly against the stream; the court from
the

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the beginning conceived it a clear case for the plaintiff. And upon the second argument the court gave judgment for the plaintiff, because though in the beginning of the licensing clause, *sect.* 3. and also in the prohibitory clause, *sect.* 5. hackney coach or coach horses are mentioned in the disjunctive, yet that must be understood coach horses to be used with a hackney coach. For all the other provisions in the act are restrained to hackney coaches, as the number to be licenced, the fine to be paid, and the annual rent; and if the act had intended that keeping hackney horses, distinct from hackney coaches, should have been licenced, it would have made some provision about it, and have reserved some revenue out of it. And *Holt* and *Powell* said, that the forfeiture of 5*l.* being for keeping a hackney coach or horses without licence, could be extended to no keeping of coach horses, but such as the commissioners had power to licence, and might have been licenced by the commissioners; but for the reasons beforementioned hackney coach horses distinct from a hackney coach cannot be licenced to be kept by the commissioners, and therefore the keeping them without licence is not within the restraining clause. And they said this would be a very hard construction, for at this rate, if a gentleman's horse fell lame he could not hire another, but must either buy another or lie still: that this trade of letting out horses had been used a long time, and was lawful for any man to do by the common law, and therefore the subject ought not to be restrained from it without express words; that this particular manner of keeping a coach and hiring the horses, was a method known and in use before this act was made. (a)

Judgment was given for the plaintiff.

(a) Note, upon the argument of this case *Powell* said, and the chief justice agreed, that if A. kept a pair of horses, and B. had a coach, and let them to B. who drove them about with the coach as hackney, that this would be keeping a hackney coach without licence in both of them. Note to the first Edition.

Wallis *vers.* Lewis.

Pleadings post vol. 3. p. 55.

IN an action upon the case the plaintiff declared as executrix, and the declaration set forth, that the defendant was indebted to her *ut executrici* for monies of the testator received after his death by the defendant to the plaintiff's use *ut executricis*; and being so indebted promised to pay, &c. The plaintiff (a) had judgment by *nil dicit*, and a writ of inquiry of damages returned. And Mr. *Dee* moved in arrest of judgment, that (b) the plaintiff had not in the declaration made any *profer* of the letters testamentary.

Holt chief justice. This declaration being grounded on a promise to the executrix herself, the naming her executrix was but surplusage. For if an executor gives an authority

received after the death of the testator. R. sec. ante 436. R. cont. ante 385.

(a) Sed vide post vol. 3. p. 55.

(b) Vide 4 Ann. c. 16. l. 1, 2.

A man who sues as executor, where he might sue in his own right, need not make a profer of the letters testamentary.

vide 3 Will. 1.

An executor may sue in his own right for money had and

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(a) Acc. ante
865, and see the
cases there cited.

to another to receive money of the testator's, payment to that person is payment to the executor. So where *J. S.* receives money of the testator's of his own head, the executor may if he pleases allow the receipt; and then it is money received to the use of the executor. So if an executor be possessed of goods of his testator's, and they are taken out of his possession, and the executor brings *trover* or *trespass*, he may in the declaration name himself executor if he will, but he need not produce the will in court, because he (a) is sufficiently intituled to the action upon his possession.

And *Powell* said, that he might bring the action in his own name, though he never had actual possession.

And afterwards at another day upon the motion of Mr. King, judgment was given for the plaintiff,

Lamine *vers.* Dorrell.

If a man takes goods to which he has no right, and sells them, the owner may waive the tort, and recover the price for which they were sold in an *indebitatus assumpsit* for money had and received.

D. acc. Cowp.
419. 1 T. R.
337. vide Burr.
1809. see also
6 Mod. 151.
Cowp. 414.

Where a person who has no right to administer to an intestate obtains letters of administration to him and sells his property, if his administration is repealed, and a fresh one granted to the person legally intituled to administer, the latter may recover from the former the money for which he sold the intestate's property in an *indebitatus assumpsit* for money had and received.

IN an *indebitatus assumpsit* for money received by the defendant to the use of the plaintiff as administrator of *J. S.* on *non assumpsit* pleaded, upon evidence the case appeared to be, that *J. S.* died intestate possessed of certain *Irish* debentures; and the defendant pretending to a right to be administrator, got administration granted to him, and by that means got these debentures into his hands, and disposed of them; then the defendant's administration was repealed, and administration granted to the plaintiff, and he brought this action against the defendant for the money he sold the debentures for. And it being objected upon the evidence, that this action would not lie, because the defendant sold the debentures as one that claimed a title and interest in them, and therefore could not be said to receive the money for the use of the plaintiff, which indeed he received to his own use; but the plaintiff ought to have brought *trover* or *detinue* for the debentures; the point was saved to the defendant, and now the court was moved, and the same objection made.

Powell justice. It is clear the plaintiff might have maintained *detinue* or *trover* for the debentures; but when the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reason of *assumpsits*. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as money received to his use. It has been carried thus far already. *Howard and Wood's case*, 2 Lev. 245. Sir *T. Jones* 126. is as far; there the title of the office was tried in an action for the profits.

Holt

Holt chief justice. These actions have crept in by degrees. I remember, in the case of Mr. *Aston*, in a dispute about the title to the office of clerk of the papers in this court, there were great counsel consulted with; and Sir *William Jones* and Mr. *Saunders* were of opinion, an *indebitatus assumpsit* would not lie, upon meeting and conferring together, and great consideration. If two men reckon together, and one overpays the other, the proper remedy in that case is a special action for the money overpaid, or an account; and yet in that case you constantly bring an *indebitatus assumpsit* for money had and received to the plaintiff's use. Suppose a person pretends to be guardian in socage, and enters into the land of the infant, and takes the profits, though he is not rightful guardian, yet an action of account will lie against him. So the defendant in this case pretending to receive the money the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator? If an action of *trover* should be brought by the plaintiff for these debentures after judgment in this *indebitatus assumpsit*, he may plead this recovery in bar of the action of *trover*, in the same manner as it would have been a good plea in bar for the defendant to have pleaded to the action of *trover*, that he sold the debentures, and paid to the plaintiff in satisfaction. But it may be a doubt if this recovery can be pleaded before execution. This recovery may be given in evidence upon not guilty in the action of *trover*, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion.

LAMINE
W.
DORRELL.

Money over-paid upon a reckoning may be recovered back either by a special action, an action of account, or an *indebitatus assumpsit* for money had and received. vide 1 T. R. 285, 343.

An action of account lies against a tortious guardian.

A recovery in *indebitatus assumpsit* may be a bar in *trover*.

Afterwards, the last day of the term, upon motion to the court, they gave judgment for the plaintiff. And *Holt* said, that he could not see how it differed from an *indebitatus assumpsit* for the profits of an office by a rightful officer against a wrongful, as money had and received by the wrongful officer to the use of the rightful.

Courtenay *vers.* Strong.

S. C. Salk. 364. but very differently reported 6 Mod. 265.

A *ssumpsit*, the plaintiff declared, that the defendant, in consideration that the plaintiff at the request of the defendant had agreed with him, that he *quosdam terras cum pertinentiis in L.* then in the possession of the defendant, *et onerabiles una cum aliis terris cum solutione cujusdam annuatis redditus 40l. tunc nuper concessi cuidam Johanni Courtenay, pro*

An agreement that a man shall enjoy certain lands which are in his possession and which are charged with an annuity to a third person

without molestation from the annuitant is not a sufficient consideration for a promise. And if an action is brought upon it, and a verdict given for the plaintiff the judgment shall be arrested.

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termino annorum tunc et adhuc venturorum, quiete occuparet durante vita cujusdam M. L. absque molestatione ipsius Jacobi Courtenay (the plaintiff) ratione ejusdem annualis redditus, promised to pay the plaintiff, &c. and also that the defendant in consideration, that the plaintiff at the request of the defendant had agreed with the defendant, that he quosdam alias terras cum pertinentiis in L. prædicta, then in the possession of the defendant durante vita cujusdam M. L. quiete occuparet, promised to pay the plaintiff, &c. Upon non assumpsit pleaded there was a verdict for the plaintiff. And Mr. Eyre in Michaelmas term last moved in arrest of judgment, that here was no consideration, for the rent charge appears to be John's and not James's.

Mr. Squibb moved several times for judgment, and cited 1 Roll. 22. n. 22. *assumpsit* in consideration that the plaintiff at the request of the defendant would permit the defendant to have and hold a messuage and land then in the occupation of the defendant to his own use, the defendant assumed to the plaintiff to pay the plaintiff 13*l.* at Michaelmas after, for rent for the premises; and held a good consideration, although it did not appear, that the plaintiff had any estate in the messuage at the time of the promise, and it did appear that the defendant was then in possession of it. And 1 Roll. 29. n. 61. 3 Cro. 703. *assumpsit*, that where A. was indebted to B. and A. came to C. and intreated him to pay B. and promised to repay him again, and thereupon C. promised to pay the debt to B. and after did not pay it; A. (a) may have an action against C. on the promise, because of the mutual promise from A. to C. whereby C. may be indemnified: and an action will lie for C. against A. upon it, even without averring payment to B. (And it seems to me, that B. also may have an action against C. being the person for whose benefit the promise was made.) So here the plaintiff might maintain an action against the defendant, without any other consideration than the mutual promise from the plaintiff to the defendant.

(a) See vide 29.
Car. 2. c. 3. f. 4.

To the first case Mr. Eyre answered, that the contrary had been adjudged, Cro. El. 859. And if it had not been so, yet this case differed from that, because here the title to the rent charge, of the plaintiff's own shewing, was in another, viz. John Courtenay, and must be intended to continue so, unless it had been shewn to have been granted out of him; in that case the thing only stood indifferent.

Holt chief justice. You should have said, that the rent charge was assigned by John to James, the plaintiff. You would have us intend it, but we cannot.

Powell

Powell justice agreed, that when it is said in the declaration, that the rent was granted to *John Courtenay*, it must be taken to be his rent. After this case had depended a long time, now this term judgment was given for the defendant.

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Holt chief-justice. The quiet enjoyment is no consideration, for the plaintiff had no right to charge or molest the defendant; that right appears of their own shewing to be in *John Courtenay*, a stranger. And a promise not to do a thing, which the person that makes the promise cannot do, is nothing, no consideration; but the promise granted on that, is merely *nudum pactum*.

Mr. *Squib* urged, that it was helped by the verdict, for now it must be intended to have been proved in evidence, that the plaintiff had a title to the rent-charge.

Holt. The (a) verdict cannot help it. You must allege (a) *Vide ante*
a sufficient promise in your declaration. 110. Dougl. 654.

Powell justice. If the plaintiff prove the promise in the declaration, he must have had a verdict.

Powell and the others agreed. Part of this case is of the report of Mr. *Pengelly*.

Knight *vers.* Barker,

S. C. 11 Mod. 66.

T Rover was brought for 400 *peciis*, *Anglice* ends, of deal boards: not guilty being pleaded; verdict was for the plaintiff; and Sir *James Mountague* moved in arrest of judgment, that it was uncertain, what an end of board meant; it should shew, how many foot or inches they were. And after several motions, judgment was given for the plaintiff, because ends of boards seem to be a term of art, and are sufficiently known among workmen, *Stile* 75.
† *Keb. 34. Walcott v. Toppin.*

Hilary Term

4 Annæ Reginae, B. R. 1705.

Regina *vers.* Highmore.

Certiorari and Conviction, post vol. 3. p. 53.

Where a justice is authorized to convict for an offence within the limits of his jurisdiction, the conviction must specify the place where the offence was committed.

THE defendant was convicted before the lord-mayor of London, upon the 16 and 17 Car. 2. c. 2. for selling coals contrary to that act, viz. less than 36 bushels to the chaldron, &c. And the conviction being removed into the king's bench by *certiorari*, it was quashed, because there was no place mentioned, where the coals were sold: which ought to have been, in regard that the power of the lord-mayor is only in case of coals exposed to sale in the city of London and liberties thereof. If the coals were exposed to sale in any other county, then the power of convicting is in the justices of peace of that respective county. And therefore the lord-mayor, to have intitled himself to a jurisdiction, ought to have shewn in the conviction, that the coals were sold within the city of London or the liberties thereof; and for want of that, the conviction is naught.

Rhodam *vers.* Watson.

A writ of error to remove a plaint for a debt of 50*l.* will not remove the record of a plaint for a debt of 54*l.* Sed nunc vide 5 G. 1. c. 13. f. 1.

Upon a writ of error in redditione judicii loquelæ quæ sunt de quodam debito quinquaginta librarum quod idem A. exigit præfato B. the words "quinquaginta librarum" cannot refer to the word judicii, they must refer to the word loquelæ.

A Writ of error of a judgment in the court of Berwick: the writ of error was, *in redditione judicii loquelæ quæ fuit, &c. de quodam debito quinquaginta librarum, quod idem W. a præfato R. exigit, &c.* and the record returned was, *loquela pro 54*l.* debt.* And for this variance the writ of error was quashed by the whole court.

The judgment was for 50*l.* and therefore serjeant *Bredrick* would have had the words in the writ of error *de quodam debito 50*l.** refer to judicii, and not to loquelæ, and so being *judicii de quodam debito 50*l.* loquelæ quæ fuit, &c.* But *Holt* said, that could not be, because of the following words, *quod idem W. a præfato R. exigit*, which ties up the

words,

words, *de quodam debito* 50*l.* to the word *loquela*; for that only is a demand, and not the judgment, the demand by the judgment being transferred in *rem judicatam*,

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v.
WATSON.

Regina *vers.* Deman.

THE defendant was indicted of perjury, and the indictment set forth a trial had before the lord chief baron, *associato sibi J. S.* by *nisi prius* in *Middlesex*; and that the defendant, being sworn before the lord chief baron upon the holy Evangelists, deposed so and so, which was false, *et sic* the defendant *commisit voluntarium perjurium coram* the lord chief baron, *associato sibi J. S.* Judgment was given against the defendant by *nihil dicit*. And now the defendant appearing in court, serjeant *Broderick* moved the court in his behalf in arrest of judgment; and it being doubted, whether he were not too late, *Holt* chief justice said, that after judgment by *nihil dicit* judgment has been arrested, but never after judgment upon demurrer. Then serjeant *Broderick* took exception, that this oath could not be at the trial set forth in the indictment, for the trial was before the lord chief baron and the associate, but the oath before the chief baron without the associate; and the assignment of the perjury differs from the oath, for that is *coram* the chief baron and associate, where the oath was before the chief baron only, and that is a material part of the indictment. And for this variance he prayed, that judgment might be stayed.

sibi A. B. No objection can be taken because the trial and perjury are stated to have been had before the chief baron, associate *sibi A. B.* and the oath is stated to have been had taken before the chief baron without mentioning his associate.

Holt chief justice. The trial is not said to have been before the chief baron, *associato sibi, &c.* And the associate need not be mentioned in every part of the indictment, where the chief baron is mentioned; but this is according to the constant form; in the *nisi prius* process, the *distingas*, and the *jurata*, and in the continuances, the associate is never mentioned, but only in the entry of the *posse*. And by the 18 *Eliz.* c. 12. which erects the *nisi prius* in *Middlesex*, there is no direction, that the judge should have any associate.

Powell justice. It shall be intended, that the associate did continue with the chief baron all the trial, having been mentioned to have been there at the beginning.

Mr. *Eyre* for the prosecutor said, that the oath was said to be *adtunc et ibidem in eadem curia*.

Judgment was given, that the defendant should be set in the pillory.

Upon an indictment the defendant may move in arrest of judgment after a judgment by default.

But not after a judgment on demurrer.

Upon an indictment for perjury stating that a trial was had before the chief baron, associate *sibi A. B.* by *nisi prius* in *Middlesex*, that the defendant *adtunc et ibidem* in *eadem curia* being sworn before the chief baron, deposed, &c. and so committed perjury before the chief baron associate

to have been had

Vaughan *vers.* Lucking.

A declaration stating that the defendant was paymaster, that he promised the plaintiff that he should be his clerk, as long as he the defendant should be paymaster, that the plaintiff served the defendant in *servitio prædicto* until a particular day, and that on that day the defendant *dimisit et expulsi* the plaintiff *extra servitium suum*, is good tho' it does not state in terms that the defendant continued paymaster after the dismissal of the plaintiff.

AN action upon the case: the plaintiff declared, that the defendant was paymaster of —, and in consideration of, &c. promised the plaintiff, that he should be his clerk, so long as the defendant should be paymaster; and avers, that he the plaintiff continued to serve him in *servitio prædicto* till such a time; and then the defendant the plaintiff *extra servitium suum penitus dimisit et expulsi*. After verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff had not averred, that the defendant continued paymaster at the time he turned the plaintiff out of his service, and consequently the plaintiff had not set out a good cause of action; for the defendant was to continue the plaintiff his clerk, only so long as the defendant continued paymaster.

But it was answered and resolved by the court, that it was averred in the declaration, that the defendant was once paymaster; and he should be intended to continue so, unless the contrary did appear. Also that it was said, that defendant the plaintiff *extra servitium suum penitus dimisit et expulsi*; which could not be, if the defendant were not paymaster. But to that answer, it was objected for the defendant, that it was *extra servitium suum* generally, and not *extra servitium suum prædictum*, and so might be some other service.

But Holt said, there was no other service mentioned, and it would be a foreign intendment to intend any other. And Powell said, that in the words next preceding, there was *servitio prædicto*, viz. that the plaintiff served the defendant in *servitio prædicto*; and then, when he comes and says, he turned him *extra servitium suum*, that must be intended the service the plaintiff served him in. And all the court agreed, that no other service could be intended. Also, if the defendant's office had not continued at the time of his turning away the plaintiff, he could never have had a verdict.

At least no exception can be taken to it on account of the omission after verdict.

Judgment was given for the plaintiff.

Moverly *vers.* Lee.

S. C. Salk. 558.

Assumpsit, in consideration the plaintiff would provide meat, drink, &c. the defendant promised to pay him so much as the plaintiff *habere meruit*, and avers in fact, that he *habere meruit* so much, &c. Upon *non assumpsit* pleaded, there was a verdict for the plaintiff. There were other counts in the declaration.

A promise to pay as much as the party *habere meruit*, upon an executory consideration, shall be construed as a promise to pay as

much as he *habere meruerit*. Vide ante 835.

Mr. Mountague last term moved in arrest of judgment, that the promise was void, to pay so much as the plaintiff *habere meruit*, which is the præterperfect tense, and denotes the time past, and consequently could be nothing; for a man could not have deserved any thing, for a thing to be done *in futuro*: and consequently intire damages being given, judgment ought to be arrested.

And so shall account upon it.

Mr. Acherley said, that it was but false *Latin*, and that was aided after a verdict by 18 *Eliz. c. 14*. Secondly, that it wanted only a dash to make it *meruerit*, and that would have been well; and the court would supply the dash. Thirdly, that if the count, by reason of that word, was insensible and impossible, the court would reject it, and intend that no damages were given for it, and give judgment on the rest of the promises. To the first it was answered, and agreed by the court, that this was not false *Latin*, but false sense, that there may be such a promise made, but it was void in its operation. And Powell said, that nothing could be given in evidence on the declaration, but meat and drink found after the promise, for which it was impossible for the plaintiff to have deserved any thing at the time of the promise. And Holt chief justice said, that a verdict cannot help nonsense, that the words of the 18 *Eliz.* were, "that after a verdict the judgment should not be stayed or reversed, by reason of any default in form, or lack of form, touching false *Latin*;" but that the act did not say, that a judgment should not be stayed or reversed after a verdict for nonsense. Secondly, that the court could not supply the dash, for that would be to make it quite another word. Thirdly, that there never was any case, where an insensible or impossible count was rejected, and aided after verdict. And upon these exceptions, the cause rested till the last day of this term, and then upon motion the court held, that they would take the words in the declaration to be the very words of the promise. And as if the words of the declaration had been in writing under the party's hands, they must have construed the promise according to the intent of the parties, and not have put such a construction upon it, as to make the promise void: so here, upon this declaration, they would construe it according to the intent of the parties, which must be

At least after a verdict.

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be to pay the plaintiff so much as he should deserve for the meat, drink, &c. found, and not construe it so as to make it a void contract. That indeed, according to the grammatical construction of the words, the promise was nonsense and void; but yet the parties certainly meant something by it, and that meaning they the court must endeavour to find, and understand the promise accordingly, rather than by pursuing the grammatical construction of the words of the promise, make it void.

Judgment for the plaintiff. The question seems to me to be, if the plaintiff ought not to have pursued the intent and meaning of the promise in his declaration.

Vide ante 270.
382. Cowp 474

AFTER verdict in an action upon a penal statute made 6th of the late king and queen, it was moved in arrest of judgment, that the statute was laid to be made 12th of November 6 Will. 3. whereas at that time the queen was alive, and the stile was Wil. & Mar. and in regard there was no such stile of the king at that time, for that mistake of the stile the judgment was arrested.

Mem. The queen did not die till December 28. that year.

Read *vers.* Charnley.

A recognizance of bail by the party that he shall not withdraw himself from the execution of the judgment, if judgment shall be given against him, is good.

A Writ of error of a judgment in the court of Carlisle, upon a *scire facias* against bail, the *scire facias* was, that the defendant *secundum usum et consuetudinem ejusdem curiae, ac civitatis praedictae a tempore, &c. usitatam et approbatam manucepit pro eodem Thoma Kemp, quod ipse dictus Thomas Kemp stabit rectus in curia, in et super querela praedicta, et default. ad nullum diem sibi inde dandum faciet, nec se retrahet, nec se absentabit ab executione judicii si judicium inde versus eum redditum fuerit, sub poena incurrendi et subeundi executionem hujusmodi judicii, si contingat ipsam Thomam Kemp in aliquo praemissorum defaultam facere, et inde legitimo modo convinci.*

Mr. Ward took exception to the recognizance, that it differed from the recognizances taken in this court, and consequently was illegal and void, this recognizance being positive, that the defendant should render himself, but those in this court, only if the defendant do not pay the money, that then he should render his body to prison.

Holt chief justice. They are both the same: the words in this recognizance are, that the defendant shall not withdraw nor absent himself from the execution of the judgment. Now if the defendant pays the money, that is an execution of the judgment, and consequently the recognizance is performed. If a *capias ad satisfaciendum* be returned, *non est inventus*, and the money be not paid, then the defendant hath withdrawn and absented himself from the execution. And the bail may plead payment by the principal.

Powell justice agreed. Judgment affirmed.

Paying the condemnation money is a compliance with the condition of such recognizance.

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S. C. Salk. 364. Holt 246. but no judgment 6 Mod. 19. Pleadings Lutw. 225.
post vol. 3. p. 326.

A Writ of error of a judgment in the common pleas, in an action upon the case, wherein the plaintiff declared, *quod cum* he the 1st of May, &c. *seisitus fuisse et adhuc seisitus existit, de et in uno mesuagio et decem acris terræ cum pertinentiis in N. parcella manerii de W. ac tentis per copiam rotuli curiæ manerii illius, ut tenens custumarius eorundem in feodo simplici, secundum consuetudinem ejusdem manerii: cumque etiam idem the plaintiff habeat et habere debeat, ipseque et omnes tenentes custumarii dictorum tenementorum suorum cum pertinentiis per consuetudinem infra manerium prædictum a tempore, &c. usitatam et approbatam habuere, et habere consueverant, communiam pasturæ in quodam loco, pastura sive mora vocata Warmlees, parcella etiam ejusdem manerii, et continente 40 acras in Northwroine, pro omnibus averiis suis communicabilibus super tenementa custumaria sua prædicta levantibus et cubantibus, quolibet anno, omni tempore anni, ad libitum suum, tanquam ad eadem tenementa cum pertinentiis spectantem et pertinentem: prædictus tamen the defendant intending to deprive the plaintiff, &c. inclosed the common, per quod in tam amplo, &c. Upon not guilty pleaded there was a verdict for the plaintiff, and a penny damages; but upon a motion, in arrest of judgment, judgment was given for the defendant in the common pleas.*

Mr. Eyre and Mr. Ward for the defendant in error, to maintain the judgment below, took these exceptions to the declaration. First, that the plaintiff in his declaration had not intituled himself sufficiently to this common. For it did not appear what sort of estate it was he had, to which he claimed common. It could not be taken to be a copyhold estate, because it was not said to be *ad voluntatem domini*, which is essential to a copyhold estate; for freeholds may be granted and held by copy of court-roll, but then they are not *ad voluntatem domini*, which makes the difference between them and copyholds. And for this were cited 1 Cro. 229. where it was laid in a declaration, that such lands were granted to J. S. and his heirs by copy of court-roll, *tenendum secundum consuetudinem manerii* of O. and that they descended to J. N. heir of J. S. and charged the defendant with the receipt of the profits as guardian to J. N. And it being objected, that these appeared to be copyhold lands, and that against one, that occupies copyhold lands, no account lies, it was resolved, that it not being said *ad voluntatem domini*, it must be intended a freehold.

None other than copyhold lands can be parcel of a manor.

Nor can any other person than a copyholder have common by custom on any part of the manor.

After a verdict all facts shall be presumed to have existed without the existence of which the verdict could not have been found.

Therefore where a man states himself to be seised as a customary tenant of a manor in fee simple according to the custom of the manor of an estate which is parcel of the manor, and held by copy of the court-roll in respect of which he has a right of common by custom on a particular part of the manor, after a verdict establishing the truth of the facts stated the estate shall be presumed to have been copyhold, altho' it was not represented to be held at the will of the lord,

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2 Ventr. 143. Where in replevin for taking his cattle in a place called *Underway*, the defendant made conuſance for rent arrear, and ſhewed, that *J. S.* was ſeiſed in fee of a cloſe called *Underway*, parcel of the manor of *L.* of which the place where was and is parcel, according to the cuſtom of the ſaid manor, and made a leaſe to the plaintiff rendring rent: and *J. S.* afterwards, *ſecundum conſuetudinem manerii prædicti* *tiel jour* at a court of the manor then held, ſurrendered into the hands of the lord of the manor *ſecundum conſuetudinem manerii prædicti* the reverſion and rent to the uſe of *J. N.* and his heirs: and the lord of the manor of the ſame court granted the reverſion and rent to *J. N.* to hold to him and his heirs, according to the cuſtom of the manor, &c. And upon demurrer the conuſance was held to be inſufficient; for that the lands being to be taken to be freehold, they ought to have a ſpecial cuſtom to paſs them by ſurrender in court, and it was not enough to ſay, that he ſurrendered them *ſecundum conſuetudinem manerii* but the cuſtom ſhould have been fully ſet forth, *viz. quod infra manerium prædictum et tempore, &c. talis habebatur conſuetudo, &c.* and that they muſt be taken to be freehold, though it is ſhewn that *J. S.* was ſeiſed according to the cuſtom of the manor, becauſe it is not ſaid at the will of the lord. 2 Lutw.

1165, 1166, 1171, 1174. Where in replevin the defendant avowed as grantee of the manor of *W.* for rent arrear, and ſhewed that the place where time whereof, &c. was *parcella manerii de W. et per totum tempus ſupradictum tenementa cuſtomaria dicti manerii et dimiſſa et dimiſſibilia per copiam rotulorum curia manerii prædicti* by the lord of the manor, or his ſteward *cuiſcunque perſonas, &c. ea capere volenti, &c. ad terminum vitæ, &c. ſecundum conſuetudinem manerii prædicti*: and that the lord of the manor at his court of the manor *tiel jour per copiam rotulorum curiæ ejuſdem manerii* granted the place where, to one *J. S. pro 99 annis ſecundum conſuetudinem manerii prædicti* rendring rent, &c. and upon demurrer the avowry was held to be ill, becauſe it was not ſaid *ad voluntatem domini*, and ſo muſt be taken to be freehold.

3 Bulſtr. 230. There in *affumpſit* the plaintiff declared, *quod cum ſeiſtus fuit in dominico ſuo ut feodo ſecundum conſuetudinem manerii de R.* of a houſe, in conſideration the plaintiff would ſurrender the ſame to the uſe of the defendant, the defendant promiſed, &c. and the plaintiff averred, that he did ſurrender; and the court reſolved that this could not be taken to be copyhold land, but yet gave judgment for the plaintiff. For freehold land might paſs by ſurrender by cuſtom, and it was not neceſſary to ſhew the cuſtom in the declaration. And in pleading a copyhold eſtate, you always ſay *ad voluntatem domini. Co. intr. 9.* An action by a commoner copyholder, for depaſturing the common: there he ſhews, that the tenement, to which he claimed his common, was time whereof, &c. *parcella manerii de B.* and by all that time di-

miſſum

missum et dimissibile per copiam rotulorum curiæ manerii prædicti by the lord or his steward, to any person that would take it in feodo simplici, &c. *ad voluntatem domini secundum consuetudinem manerii prædicti*. And when he comes to shew the grant to himself, he pursues that form. So is *Rast. Intr. 627.* 2. It cannot be taken to be a freehold estate, because it is said to be parcel of the manor, and a freehold estate cannot be a parcel of a manor. 2 *Roll. Abr. 120.* So that there can be no such case as is set out in this declaration, and consequently the plaintiff cannot recover. Secondly, supposing upon this declaration the court can take the estate to be either freehold or copyhold, yet the common is not sufficiently claimed. For if you take it for a copyhold estate, the custom ought to have been alleged expressly and specially, *quod infra manerium talis habetur, necnon a tempore cujus, &c. habebatur, consuetudo quod, &c.* and not as here, *per consuetudinem infra manerium prædictum a tempore, &c. usitatum et approbatam habuere et habere consuevere, &c.* as in the case before. And so it is laid in 4 *Co. 31. b. Vaugh. 251, 253.* where in trespass, the defendant justified under a custom for the copyhold tenants of a manor to have *solam et separalem pasturam* in the place where; and the custom was laid with a *per consuetudinem in eodem manerio, &c. usitatum et approbatam habuere et habere consuevere, &c.* And my lord Vaughan says, it is double, including both the custom of the manor, and the claim by reason of the custom, which ought to be several. And the court should judge, whether the claim be according to the custom alleged. 3 *Cro. 185.* In debt upon an escape, the plaintiff declared, that he recovered a judgment against *J. S.* in London, and sued a *capias ad satisfaciendum* against him; upon which *non est inventus* was returned: upon which one of *J. S.*'s sureties being in prison upon a plaint there, was detained in execution *secundum consuetudinem civitatis prædictæ*: and upon demurrer the declaration was held to be ill, because it was not expressly said, that there was such a custom; but only *secundum consuetudinem*; and according to that way of laying the custom mentioned before out of 4 *Co. 31. b.* are the precedents in the books of entries, *Co. Intr. 123. b. Rast. Intr. 627.* and besides, the common is claimed here *tanquam ad tenementa customaria spectantem*, which cannot be in case of a copyhold; for a copyholder hath common by reason of the custom, which annexeth the same to his customary estate; and therefore, if the copyholder purchase the freehold of his copyhold estate of the lord, and thereby infranchiseth the same, his (a) common is destroyed. And so is the case of *Marshall vers. Hunter*, 2 *Cro. 253.* and in 2 *Brownl. Intr. 96.* the clause is left out. Indeed the greatest part of the precedents are as this is, but they passed *sub silentio* and therefore now it comes to be disputed, the reason of the thing ought to prevail. If it be taken to be a freehold estate, then the declaration is

(a) Vide Salk.
170. 366.
6 Mod. 20.

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Salk. 363.

much worse; for then the plaintiff ought to have prescribed in a *que estate*, and cannot make a title by custom: and for that was cited 1 Cro. 418. where the plaintiff declared, that he was possessed of a close in the parish of *M.* for years, and that within the said parish there is, and time whereof, &c. was a custom, that *omnes occupatores* of the plaintiff's close, time whereof, &c. *habuerunt et habere conseruerunt* a way, &c. After a verdict for the plaintiff upon not guilty pleaded, the judgment was arrested, because he ought to have prescribed in him that had the inheritance, and could not claim it by way of custom. To the objection, that this was a possessory action, and therefore the plaintiff had no need to set out any title, according to the cases of *Stroud vers. Birt*, &c. it was answered, that where the plaintiff in his declaration undertakes to set out a title, and sets it out insufficiently, the declaration will be ill, though the setting out the title was more than needed. And the case of *Dorne vers. Cashesford*, Mich. 9 Will. 3. B. R. was cited, where the lessee for years brought an action upon the case, for stopping his way, and prescribed in a *que estate*: and after verdict for the plaintiff, judgment was arrested, because, though it had been enough to have said *habuit et habere debuit* (which were part of the words of the prescription, and as was urged ought only to stand, and the rest be rejected) yet when the plaintiff has laid a prescription, which is ill, it will vitiate his declaration; and the court cannot reject one part of an intire sentence, and retain the rest. And the same answer was given to the objection, that the verdict would make this declaration good, it being found by that, that the lands were parcel of the manor, and that there was such a custom for common, neither of which could be, unless it was a copyhold estate. And the case of *Dorne vers. Cashesford* cited to that: and it was observed, that the case cited out of 1 Cro. 418. was after a verdict. And the cases also of 2 Cro. 315. debt upon a bond: condition, that the plaintiff should enjoy such lands without eviction: the breach was assigned, that the plaintiff had the lands recovered from him by verdict in ejectment upon a lease made by one *E.* but did not shew what title *E.* had to make the lease, but only that he had good title: and upon a rejoinder that the recovery was by covin, and issue upon the covin, and a verdict for the plaintiff; yet the judgment was arrested for the insufficiency of the breach, because it was not said, that *E.* had a prior title before the plaintiff's title, for it might be, *E.*'s title was under the plaintiff. 2. *Saund.* 136. *assumpsit*, in consideration the father of the defendant, whose son and heir he is, was bound to the plaintiff, &c. the plaintiff intending to sue the defendant, he promised in consideration of forbearance, to pay, &c. and on *non assumpsit* pleaded there was a verdict for the plaintiff, and yet judgment arrested.

2 Saund. 180.

1 Mod. 294. the

same case with

2 Cro. 315.

Covenant vers.

a feme covert on

a fine sui concessit,

and warranty

against all men,

and breach

assigned, that *Y.*

S. habens legale jus et titulum to the tenements entered, &c. and issue upon ejecting, and a verdict for

the plaintiff, and yet judgment arrested.

for the plaintiff, but the judgment was arrested, because it was not said, that the father bound himself and his heirs, and so there was no consideration for the promise. And from these cases it was observed, that where the plaintiff in his declaration, &c. sets out his title insufficiently, or assigns an insufficient breach, a verdict will not help it: that the cases before cited of *Stroud vers. Birt*, &c. were not adjudged upon the verdict, for those declarations would have been good upon demurrer.

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Broderick and Chesbyre serjeants, for the plaintiff in error argued, that the declaration was good enough. And as to the first exception they said, that this must be taken to be copyhold, for it is said to be *parcella manerii*, which freehold land cannot possibly be, and also that it is *tenta per copiam rotulorum curiae manerii illius*, and farther that the plaintiff is seised of it, *ut tenens custumarius ejusdem in feodo simplici secundum consuetudinem ejusdem manerii*. And in 4 Co. 24. b. 31. b. it is resolved, that the two main pillars, upon which copyhold estates stand, are, that the land is parcel of the manor, and that it has time out of mind been demised and demisable by copy of court-roll. The words, that he is seised *ut tenens custumarius*, necessarily imply, that it is copyhold; for this is the phrase which is used where a lord of a manor prescribes for common for him and his copyhold tenants in the soil of another, viz. *pro se et tenentibus suis custumariis*, and no more. Co. Intr. 9. a. and in *Rast. Intr.* 131. b. where a custom is pleaded for copyhold tenants to surrender out of court: they are called only *tenentes custumarii*. In Co. Intr. 123. where a custom to grant by copy is set out in an action of debt for rent against the lessee of a copyholder, and also a grant pursuant to it; in both, the words *ad voluntatem domini* are omitted, and no more in effect said than here. So in Co. Intr. 373. where grants by copy were found in a special verdict, the same words were omitted, and only said *secundum consuetudinem manerii*. And as to the cases that have been cited, they do not come up to the case in question. In the case in 1 Cro. 229. there were not the words *tenens custumarius*, nor *parcella manerii*. In the case in 2 Ventr. there were indeed the words *parcella manerii*, but there were not the words *tenta per copiam rotulorum curiae manerii illius*, nor *ut tenens custumarius*: that the case in 3 Bulstr. was rather for them, because the court there went upon the want of *tenta per copiam rotulorum*, which is said in this case. To the second objection, that the custom ought to have been set out specially, and not with a *per consuetudinem*; it was answered, that the custom was well enough laid in substance, and the informality of laying it would be cured by the verdict. If a man makes title as cousin and heir, and does not say *coment*, yet that is well upon a general demurrer. Where a man prescribes for com-

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mon without number, the want of *levant and couchant* is helped after a verdict, though it is the very measure of the common. *Sty.* 428. 1 *Mod.* 7, 75. 2 *Sid.* 87. In action upon the case for stopping his way to his house, the plaintiff prescribed in a *que estate* to a way to his house, but did not say, that his house was *antiquum*, but the want of *antiquum mesuagium* was helped by the verdict. *Latch.* 110. *Palm.* 420. And as to the objection, that the common was claimed as appurtenant to the customary tenements, whereas it was appurtenant to the customary estate; they answered, that the precedents were all so, though it must be confessed, that according to the case in 2 *Cro.* the common is in strictness appurtenant to the customary estate. And for precedents were cited 9 *Co.* 113. the entry of that case, *Co. Intr.* 9. *Dyer* 363. b. 1 *Saund.* 349. 2 *Saund.* 321. *Co. Intr.* 574. *Winch. Intr.* 931, 1026, 1111. *Herne* 81. *Brownl. Red.* 428, 430. The court agreed, that if it did not sufficiently appear to them on this declaration, whether this were common belonging to a copyhold or a freehold estate, it would be ill, because they could not give judgment for they knew not what. And the chief justice put the case of an action for stopping the plaintiff's lights: it would be a good declaration to say, that the plaintiff was possessed of a house, in which were ancient lights, and that the defendant stopped them. But in trespass for abating the nuisance the defendant in his justification must have prescribed for the lights, and shewed the commencement of his term. And in the case of a declaration, if the defendant plead *liberum tenementum*, the plaintiff must reply, and set out his title. They did also agree the difference between a declaration, and an avowry: that a declaration being against a wrong doer is good without setting forth a title; otherwise of a bar to an avowry, or a justification. And therefore if this plea had been in a justification in trespass, or in a bar to an avowry *damage feasant*, it would have been unquestionably ill. But the chief justice and *Powell* differed, whether in this declaration the plaintiff had set out a title *tiel quel.* or no. The chief justice held, that it was only a description of his estate, and not any ways a setting out of a title. He says, indeed, that he and all the customary tenants of his tenements ought and used to have common; but if he would have set out a title, he should have said *quod consuetudo talis est*, for all the copyhold tenants to have common; and then he should have shewed a grant from the lord to himself, and that the tenements were demised and demisable, &c. as must have been done in a bar to an avowry. *Powell* thought, that when in his declaration he mentioned the custom, that shewed that he intended to have set out a title. And though in possessory actions the plaintiff may declare upon his possession, without setting out his title; yet if he undertakes to set out a title, and sets it out insufficiently,

the

the declaration will be ill. Which rule the chief justice agreed. As to the objection of *ad tenementa customaria pertinentem*, the chief justice said, that if the common belonged to the copyhold estate, it did belong to the tenements, and that all the precedents were so.

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The chief justice said, that the great difference between copyholds and customary freeholds which pass by surrender is, that the copyholder is in by demise from the lord; but in case of those customary freeholds the lord is only an instrument: and in pleading one's title to a copyhold estate, it is enough to shew a grant from the lord. But that will not be a good title in case of those customary freeholds; but you must shew, that the surrenderor was seised in fee, and made a surrender to the lord, who granted it to the surrenderee.

S. P. Saik. 365.
Vide ante 1186.
and the cases
there cited.

What is before reported was said by the court upon the argument of the case.

After great deliberation the court this term reversed the judgment in the common pleas, and gave judgment for the plaintiff.

Holt chief justice. The fault in this declaration is helped by the verdict. It is fully enough expressed to shew it to be copyhold estate, though it be not so formally done. It is said to be parcel of the manor, and that by the custom of the manor the plaintiff is intitled to common, and all this is found by the verdict. It should have been said indeed, that the tenements were held at the will of the lord according to the custom of the manor, to have them appear fully to have been copyhold; but unless they were copyhold, it is impossible this finding can be true. I mentioned a case this term between *Bickerstaffe* and *Perkins*, which is reported 1 *Sid.* 218. where an action was brought by an executor upon a demise by his testator rendering rent, for rent accrued after the death of the testator; and upon *non detinet* pleaded, there was a verdict for the plaintiff; and it was moved in arrest of judgment, because the plaintiff had not shewed what estate the testator, that made the demise, had; for the intendment *prima facie* is, that a man that makes a lease for years is tenant in fee simple, by his carving out a particular estate; and if so, then the reversion and rent could not come to the plaintiff: and therefore the plaintiff ought to have shewed, that his testator was possessed of a term for years, and made an under-lease, the reversion to himself, &c. and for want of that it was agreed of all hands, the declaration would have been ill upon demurrer: and yet this declaration was held to be well after verdict, because

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the verdict had found the plaintiff's title; for now that had found, that the estate the lessor of the testator had, was a term for years, and not only so, but also that it was larger than the term devised to the defendant, so as a reversion of the term was in the testator; for if that had not been so, the plaintiff could never have had a verdict. Now that was a greater defect than this in this case, the indentment being against the plaintiff, and the defect in the plaintiff's title.

Powell justice retained his former opinion, that this was a defect in the title, and that the plaintiff had undertaken to shew a title. He agreed also the former difference between declarations and avowries; and that though in declarations it is not necessary to shew a title, yet if you do shew a title, and shew it insufficiently, it will be ill upon demurrer. But he held, that it was cured by the verdict, for a defect of title in a declaration may be helped by verdict. And he put the common case, that an assignee of a reversion brings debt for rent, and in his declaration does not shew an attornment; on *nil debet* pleaded, and a verdict for the plaintiff, the defect is helped. And unless these tenements had been copyhold; this verdict could never have been found, because unless they had been so, they could never have been parcel of the manor.

See 2 Lut. 126.
the report of this
case in the com-
mon pleas.

Powys justice said, that he had spoke with judge *Blencowe*, and he had informed him, that they did not consider in the common pleas of the verdict's finding the tenements to be parcel of the manor.

Gould justice said, that in the case of *St. John* against *Moody* old *Hale* said, that however it might have been upon demurrer, it was helped by the verdict; for all defects of title are helped by a verdict. And he put the case of the want of attornment put by *Powell*.

Regina *vers.* ballivos, burgenfes et communitatem villae de Gippo.

Tho' an act of parliament on authorising the performance of a particular act nominates a quorum, it is not necessary that the persons mentioned in it should expressly consent to it, it is sufficient if they are present when it is done. S. C. Saik. 434. Holt. 443. A. acc. Str. 53.

A Mandamus to restore Mr. serjeant *Whitaker* to the place and office of recorder of the town of *Ipswich*; they made a special return, which as to the matters which were debated in court upon the return, was this: the writ was directed to them by the name of ballivi, burgenfes, et communitas villae de Gippo in comitatu Suffolk: then the return was: responsio ballivorum, burgensium, et communitatis villae sive burgi Gippwici in comitatu Suffolk ad breve huius schedulae annexum. Nos ballivi, &c. villae sive burgi Gippwici in comitatu Suffolk, &c. And then returned, quod villa de Gippwico est et tempore cuius, &c. fuit antiqua villa et antiquus burgus, ac burgenfes et inhabitantes ejusdem villae are, and by all the time aforesaid were, a body corporate, tamen diversis temporibus per varia nomina cognitum et nuncupatum: and then set out the charter of confirmation of king *Charles II.* in which,

which, among other things, are these clauses; that they should have *unum virum discretum et in legibus Angliæ peritum*, who should be their recorder, and that *J. S.* should be their present recorder *continuandus in eodem officio pro et durante vita sua naturali, nisi interim pro malegestura in officio illo, sive aliqua alia rationabili causa, abinde amotus esset per ballivos, burgenses, et communitatem, &c. pro tempore existentes, vel per majorem partem eorum, quorum ballivos, &c. duos esse voluit; ac etiam ballivos, burgenses et communitati, &c. et majori parti eorum pro tempore existentibus, quorum ballivos, &c. pro tempore existentes duos esse voluit, talibus et consimilibus casibus plenam potestatem et auctoritatem idem nuper rex dedit et concessit, &c. tam præfatum J. S. quam aliquem alium recordatorem, &c. in posterum eligendum pro tempore existentem ab hujusmodi officio recordatoris, &c. totaliter expellere et amovere: and that whenever the office of recorder should happen to be vacant by death, &c. the bailiffs, burgesses, and commonalty for the time being, or the major part of them, of whom the bailiffs should be two, should chuse another *pro vita sua vel aliter*, at the pleasure of the bailiffs, burgesses and commonalty *ita quod* such recorder should be removable and removed as aforesaid *pro malegestura*, or any other just cause: and that the recorder should take an oath well and truly to execute all things belonging to the said office; and that the recorder for the time being, together with the bailiffs and four of the burgesses to be elected out of the portmen should be justices of the peace of the said borough: and that if any burgess or freeman should be elected into the office of one of the bailiffs, one of the portmen, &c. and after notice of such election should refuse to execute the said offices, the common council of the town should have power to fine such person so refusing; and*

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A corporation can do no act in the absence of the head of the corporation.

If a statute authorizes a corporation to remove an officer making the bailiffs who are the heads of the corporation, of the quorum, an allegation that he was duly removed by the bailiffs or the bailiffs being present, implies that the requisites of the statutes were complied with in the removal.

Unless a commission of the peace nomina est a quorum, all the justices appointed by it must attend at a sessions.

The recorder of a corporation is bound to attend the corporation sessions. S. C. Salk. 434. Holt 443. Vide 1 Vent. 143. 2 Keb. 770. 796. Burr. 1999. tho' he is not sent for.

If he does not, he forfeits his office. S. C. Salk. 443. Holt. 443. Sed vide Burr. 1999. x Hawk. c. 66. s. 1.

Justices need not issue a warrant for holding a sessions.

An allegation that justices appointed a sessions implies that every thing necessary to make the appointment legal, was done.

The recorder of a corporation is not compellable by an order of the corporation to deliver up the corporation books and writings to any other officer of the corporation.

Nor is he bound to give advice except to the corporation at large.

And he need only advise them how to order and execute their processes and judgments according to law.

If a corporation make a return to a mandamus which they call *executio istius brevis*, quære, whether they shall be at liberty to insist upon an allegation at the end of it that they were never incorporated or known by the name by which the writ is directed to them. S. C. Salk. 434. Vide Holt. 445.

A person who appears to and answers a charge cannot object to a want of notice. S. C. Salk. 434. Holt. 443. Vide ante 225. and the books there cited. Str. 261.

Or a defect in it. S. C. Salk. 434. Holt. 443.

If a corporation charges one of their officers with what does not appear to be an offence, tho' he may answer and answer insufficiently to what is, they cannot remove him. S. C. Salk. 434. Holt. 443.

No matter can be urged against the grant of a peremptory mandamus which might have been returned to the first mandamus, but was not. S. C. Salk. 434. Holt. 443.

A peremptory mandamus must be directed as the first was. S. C. Salk. 434. Holt. 443. Vide Holt. 445.

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that the bailiffs, burgesses and commonalty should have power to levy such fines by distress and sale of his goods. Then they return, that upon the death of J. S. serjeant *Whitaker* was duly chose by the bailiffs, burgesses, and commonalty for the time being, the bailiffs for the time being being actually present, recorder, to hold the office *ad libitum* of the bailiffs, burgesses and commonalty: and that he took the oath of recorder, which they returned *in hanc verba*, in the latter end of which is this clause, "you shall at all times to the best of your learning give your advice and counsel to the bailiffs of the same town for the time being, how they shall order and execute their processses and judgments according to the form of law, and to the most honour and profit of the same town:" and that afterward and in the same manner serjeant *Whitaker* was confirmed recorder for his natural life. And then they return, that serjeant *Whitaker*, the bailiff, and one of the justices elected out of the portmen, on the 6th of January 1702. *appunctuabant quod ipsi tenerent sessionem pacis* for the borough in the *Motehall* there upon the 14th of January following, at two in the afternoon: and that a precept was issued out by the same persons accordingly the same day to the serjeants at mace, to return a grand jury, and summon all officers, whose attendance was necessary, and to proclaim the sessions: and that the sessions was proclaimed accordingly by the crier: and that serjeant *Whitaker* had notice of all the premisses: and that the bailiffs and the other justice, and the jury, and all other persons necessary to the holding a sessions, except the serjeant, assembled at the day and place appointed, and there remained several hours, and were ready to have held a sessions of the peace for the borough, if serjeant *Whitaker* had been present; but the serjeant did not come at the hour appointed, nor all the afternoon, to the place appointed, *licet solemniter exactus*, but voluntarily and without any reasonable cause absented himself, so that by reason of his absence the sessions could not be held according to the appointment and notice, to the great detriment of the bailiffs, burgesses, and commonalty, and against the duty of the serjeant's office. Then they return another sessions of the peace, appointed to be held on the first of April 1703, and the serjeant's default as before, *mutatis mutandis*. Then they return farther that the serjeant had several court-rolls, books, writings, and deeds, concerning lands belonging to the bailiffs, burgesses, and commonalty, and likewise letters patent, whereby divers franchises were granted to them by *Edw. 4.* in his hands and possession, which belonged to the bailiffs, burgesses, and commonalty: and that thereupon they made an order, that the serjeant should deliver them to the clavigers of the corporation upon notice of the order; but the serjeant, though he had notice of the order, refused

refused to deliver them to them, to the great detriment of the bailiffs, burgesses and commonalty. And they return further, that one *Edward Gasll* being chosen one of the portmen, and refusing to accept of the office, and qualify himself, pretending that he was a dissenter from the church, the bailiffs and common council being assembled to consider, whether they could compel him to hold the office, and concerning the setting a fine upon him, and levying it, and distraining for it, for not taking the office upon him, the bailiffs asked the serjeant's advice about it, and he, though he was then in the common council, refused to give the bailiffs his advice, against the tenor of his oath, and the duty of his office of recorder. And they also return another refusal to other bailiffs upon the same matter. Then they return that upon the 9th of *June 1704.* the bailiffs, burgesses and commonalty being assembled, the bailiffs actually present, they had notice of the several misdemeanors before alledged and committed by the serjeant in the execution of his office of recorder; and upon consideration thereof they ordered, that the serjeant should have notice of the premisses objected to him. Then they return the notice *in hæc verba*, which took notice of the several misdemeanors before alledged, and required him to answer them if he could; and as to the not holding the sessions of the peace, was in these words: "Why you did not by your attendance assist Mr. Bailiffs, and other her majesty's justices of the peace, for this town at the *Motshall* in *Ipswich*, on the 14th of *January 1702*, and also on the 8th of *April* following, at which times and place there should have been the general quarter-sessions of *oyer and terminer* and goal-delivery holden for this town, according to the several usual proclamations publicly made for that purpose, you knowing that by the charters of this town no sessions of the peace could be holden for this town without the actual presence of the bailiffs and recorder thereof:" and to shew cause why he should not be discharged of his office of recorder for the said misdemeanors. Then they returned, that they ordered that notice to be delivered to him, and that notice should be given to him to answer the said matters so as aforesaid objected to him, and to shew cause on the 8th of *September* next following to the bailiffs, burgesses, and commonalty, why he should not be discharged from his office of recorder, for the said misdemeanors in his said office: and that the several notices in writing were delivered to the serjeant on the 10th of *August 1704.* And then they return, that upon the 8th of *September* aforesaid, the serjeant appeared before the bailiffs, burgesses, and commonalty, the bailiffs being actually present at the *Motshall*, and then and there *prædictæ separales malegesturas prædicti Carolo in officio suo recordatoris, &c. in præsentia et auditu prædicti Caroli per curiam illam ei objectas fuerunt*: the serjeant answered, *quoad suas notatencias*

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demias ad sessiones pacis praedictas, he expected to have been sent for, when they were ready: and as to the other articles, declared that he was not bound to answer to them, and refused, and did not answer any thing to them. Whereupon *ad tunc et ibidem auditis et plene intellectis per eosdem ballivos, burghenses, et communitatem, &c. praedictis ballivis, &c. pro tempore existentibus tunc et ibidem actualiter praesentibus*, all the matters and misdemeanors objected to the serjeant in his office of recorder, &c. and heard proof of them by divers credible witnesses, and heard all the matters alledged by the serjeant in his defence, *ad tunc et ibidem consideratum fuit et adjudicatum per ballivos, burghenses et communitatem, &c. praedictis ballivis, &c. pro tempore existentibus tunc et ibidem actualiter praesentibus*, that the serjeant was guilty of all and each of the misdemeanors objected to him as aforesaid in his office of recorder; *modo et forma prout, &c.* and that for the misdemeanors aforesaid he should be removed: and then and there, *per eosdem ballivos, burghenses, et communitatem, &c. pro malegesturis illis in officio suo praedicto* the serjeant *debite modo amotus fuit*, and that he was never elected into the office since; and therefore they had not, nor ought to restore him: *et ulterius certificamus quod burghenses, et inhabitantes villae sive burghi praedicti, aut aliquorum, nunquam incorporati fuerunt, nec ullo tempore legitime nuncupati fuerunt, per nomen ballivorum burghensium et communitatis villae de Gippo in comitatu Suffolk, prout in breve huius schedulae annexo mentionatum est.* Several exceptions were taken to this return. First an exception stirred by the chief justice, that in the power given in the charter to the bailiffs, burgesses, and commonalty, or the major part of them, to turn out a recorder *pro malegestura* the bailiffs are made of the *quorum*, and therefore the bailiffs' consent was necessary to the doing of it; and here in the return they had only said that the bailiffs were present, but not that they did consent as they ought.

Two answers were given to this exception. First, that this must be understood like the like clauses in commissions of *oyer and terminer*, peace, &c. which require the presence of the persons named in the *quorum*; but it was never yet thought, that their actual consent was necessary to every act that was done, and that if they consented the majority could not act; but their consent has been always taken to be included in the consent of the majority. Secondly, that it was returned here, that he was *debite modo amotus per ballivos, burghenses, et communitatem*, which must be understood of them all, and consequently both bailiffs consented.

This exception was over-ruled by the court, partly upon the second answer, and also because the *quorum* the bailiffs should

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should be two, was like the *majori parti eorum*, no more than the law implied. For as in all corporate acts, the act of the majority is the act of the whole, so the bailiffs, being the head of the corporation, nothing can be done without their presence; and this is so, though no special provision be made for it by the charter. And so it comes within the rule of *expressio eorum quas tacite insunt nihil operatur*, and consequently their express consent is not necessary, but is involved in the consent of the major part.

To the cause of forfeiture assigned in not holding a sessions of the peace, two exceptions were taken. First, that a sessions of the peace might be held without him, he not appearing to be of the *quorum*, and two justices of the peace may hold a sessions of the peace. And secondly, admitting it could not, yet first, they ought to have sent for him; and secondly, they ought to have shewn some special damage to the corporation by the not holding the sessions. To this it was answered and resolved by the court, first, that admitting the presence of the recorder were not necessary by the charter to the holding a sessions of the peace (though the chief justice observed, that it did not appear by this return, that there was any *quorum* of the justices of peace; and where a commission is granted to twenty persons to be justices of peace, and there is no *quorum*, they must all attend at the holding a sessions, and if so, then the serjeant's absence must be a forfeiture,) yet he must attend for it was the intent of the charter in making such an officer, that he should assist the corporation in matters of law; and the justices of peace, though they had power, yet they might be afraid to proceed to the holding of a sessions without their recorder. And secondly, this office being a public office concerning the administration of justice, the officer is to attend at his peril, and non-attendance is a cause of forfeiture of his office, though no inconvenience ensue by his non-attendance. And the difference is between public and private offices. And so is *Co. Lit. 233. a. 9 Co. 59*. Though, as the chief justice said, in this case the corporation might be disfranchised for neglecting to hold sessions of the peace, and so his non-attendance was a damage to them.

Thirdly, it was objected, that it did not appear in the return, that the sessions of the peace was well appointed to be held; for they should have shewed, that the justices issued a warrant under their hands and seals. To this it was answered, that it was not absolutely necessary to the holding of a sessions, that a precept should be issued under the hands and seals of the justices; but if the jury and all persons necessary to hold a sessions appeared, it would be well held, though no warrant had been issued out. And so is *Lamb. 367*. But if it were necessary, it appeared sufficiently

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ficiently here, that it was done, for so much was implied here under the *præceptum* *est*. And so is the constant form of pleading writs. And the court over-ruled this objection.

And the chief justice said, that *appunctuabant* must be understood a legal appointment; and he agreed that matter of holding a sessions without an appointment by warrant or otherwise than by agreement between the justices to meet and hold it; but said, that the usual way of appointing a sessions was by issuing out a precept to summon it, and that without such a precept no body could be compelled to appear.

Fourthly, as to the serjeant's refusing to deliver the books, &c. to the clavigers, it was objected, that that was no cause of forfeiture of his office; because the corporation might resort to them, and make use of them in his hands, and he was the proper officer, in whose custody they ought to be.

The chief justice and *Powell* seemed to think this no cause of forfeiture. And *Powell* said, they might bring an action of detinue for them.

(a) Vide Burr.
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Fifthly, as to the not giving advice, the chief justice said, he was not bound to give advice to the bailiffs, but only to the whole corporation: that indeed he was their adviser, and ought to advise them; but he might do it in a reasonable manner, and was not (a) bound to give any positive opinion. It was pretended on the behalf of the corporation, that this refusal was against his oath; but that was held to be otherwise, the advice there mentioned being restrained to ordering and executing their processes and judgments according to law.

Sixthly, it was objected on the part of the corporation, that the writ was misdirected, and therefore ought to be quashed, they having returned expressly, that they were never incorporated, nor named by the name of bailiffs, burgesses, and commonalty *de Gippo*, as they are named in the writ.

And Mr. *Raymond* cited the case *Pasch. 10 W. 3. Rex v. Morris*, ante 337. where a writ was directed to the mayor and burgesses of the city of *Lincoln*, in the county of *Lincoln*, where it should have been in the county of the city of *Lincoln*: and the corporation took advantage of it in their return as here; and though the return was insufficient, the plaintiff could not get a peremptory *mandamus*, but the writ was quashed. He cited also the case *Pasch. 12 W. 3. Rex v. the mayor of Rippon*, ante 563. where the like mistake was made,

made, and advantage taken of it in the return: [But according to my notes in that case there turn was allowed upon the merits, and the writ never quashed] and that there was a material difference between *Gippus* and *Gippwicus*; the first being but half the name, and *wick* signifying according to *Spelman verbo wic*, a port or bay, and so probably added to distinguish this from some other *Gippus*: and that *Gippus* and *Gippwicus* was no more the same name, than *Ips* and *Ipswich*. And he cited *Camden's Britannia* 372, that the ancient name of the place was *Gippewich*, and that they never were named in one charter by the name of *Gippus*.

The chief justice doubted, whether to have taken advantage of this mistake they should not have returned it positively at first, and relied upon it. For he said by their own return it appeared, that they were called and known by divers names, and so the writ and the return were consistent: and then, when they by making a return admit themselves the persons to whom the writ is directed, for they call the return *executio istius brevis*, which it is not, if they are not the parties to whom it is directed, and the return not being inconsistent with the writ, though in the end of the return they do positively aver, they are not, nor ever were incorporated, nor named by the name of *Gippus*, yet if that will be sufficient against their own admittance?

Powell justice was on the contrary against the chief justice: but upon looking into the record it appeared, that *Gippo* in the return was writ with a dash, and *Gippo* in the writ was without a dash, and so not *ad idem*, and so this point was put out of the case.

The chief justice took this difference; where a corporation by one name is incorporated anew by another name, where they shall lose their first name, and where not, viz. where the new charter alters the constitution of the corporation, and new models it, there they shall lose their old name: otherwise, if the constitution as to all the integral parts of it remain the same; though the new charter gives them a new name, the old one remains. For the purpose, if a mayor be added, or a mayor and masters are made mayor and aldermen, or an abbot and convent, a dean and chapter; there they lose their old name, because new integral parts of the corporation are added. But if the inhabitants *Gippwici* were incorporated by the name of bailiffs, burgesses, and commonalty *Gippwici*, and then a new charter is granted to them that they shall be called by the name of bailiffs, burgesses, and commonalty of *Gippwici*, yet they may use the first name, because the town is the same, and the old constitution remains.

Where an existing corporation is incorporated anew by a fresh name, if it alters their constitution, it destroys their old name. S. P. Salk. 434.

otherwise it does not. S. P. Salk. 434. vide ante 30.

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When all these matters were got over, the notice was objected against. First, that there was no time appointed by the notice, when he should appear to answer to the matters charged in the notice. Secondly, that he was not charged in the notice with not holding a sessions of the peace, but *oyer* and *terminer*, and gaol-delivery. To these objections it was answered, and resolved, that the serjeant appearing, and being charged, and answering, supplied the want of notice, both of the time, and of the offence. And for that was cited *Palm. 453. Harris's case*, which case was argued by the court. And the chief justice said, that in justice convenient notice ought to be given for the party to prepare for his defence; but he might waive that, if he would. Secondly, it was answered, that it appeared by the return, that notice of the day was given, and that in writing, it being said, *quod separales notitias in scriptis* were delivered to him; though the chief justice said, the notice of the day might be well enough given by the officer by word of mouth. But then it was objected, that he was not charged for not holding a sessions of the peace, but *oyer* and *terminer* and gaol delivery: and if he was not charged with it, though he did answer to it, his answer was impertinent, and will not help the want of notice: he was charged with one thing, and answered to another. For the *praedictae separales molestationes* must be understood those in the notice, or at least it may be understood of them, and that will be sufficient to vitiate the return; which being to turn a man out of his freehold, ought to be precisely certain, and cannot be aided by intendment. Which the court agreed, and granted a peremptory *mandamus*, but directed that it should be awarded according to the first writ, *ballivis, &c. de Gippe*; for they said it must pursue the first writ, and they could not grant it different from that.

The solicitor general opposed granting a peremptory *mandamus*, because the recorder was an officer *ad libitum* of the corporation; and cited 1 *Sid. 14. Rex v. Campion*. But that objection was contrary to the return, whereby he appeared to have been confirmed for life. And *Holt* said, that if he had been an officer *ad libitum*, the corporation ought to have returned that, and relied upon it, and it would have been a good return; but they could not take advantage of that, when they had returned a cause, if the cause were not sufficient; for it appeared, that they had not gone upon their power, and determined their will, but put him out for a misdemeanor.

The chief justice also said, that the court could not take notice of towns any otherwise than they appeared to them on the record, though they did of counties.

Seignorette *vers.* Noguire.

AN action of covenant brought on articles of partnership, whereby it was agreed, that the three defendants should contract for 336 shares of the royal lustring company, for which the plaintiffs were to pay the money, and to have the shares delivered to them; and the plaintiffs were to have interest for their money; that the plaintiffs and defendants were to manage the shares in partnership, and in case of difference in opinion the most voices to carry it, the plaintiffs to be but one voice: that when any of the shares should be sold, the money should go to satisfy the plaintiffs the principal and interest of what they advanced; the partnership to continue for four years, to begin with the day of the date of the contract for the shares: that after the expiration of the said four years, the plaintiffs should not be obliged to keep any of the said shares, which should then remain unfold any longer, but might sell them to make an end of the account of the partnership: and if there should be any loss, the same should be born, one fourth part by the plaintiffs, and the other three fourths by the defendants. The contract for the 336 shares is laid to be made 13 April 1693. and for breach the plaintiffs shew, that after the four years elapsed, the plaintiffs sold 174 shares, which were what were then remaining of 336 shares, for 2921 l. 10 s. and no more, which was the best price could be got for them: so that the damage came to so much, three fourths of which was so much, for which the plaintiffs brought this action. The defendants craved *oyer* of the articles, and they were entered *in hæc verba*; and it appeared, that the commencement of the four years was to be from the day of the date of the contract. The defendants pleaded, that before the sale of the 174 shares, *viz.* the 23d of Nov. 1698. the plaintiffs *vendidere et transfudere* the said 174 shares, *viz.* 90 shares to R. L. and 84 shares to W. S. and that at the time of selling and transferring aforesaid, *currens et vendibile pretium* of the said 174 shares was so much: and so there was no loss. The plaintiffs replied, and traversed the sale of the 174 shares, *modo et forma*, and thereupon issue is joined; and the jury found a special verdict, that the plaintiff *Seignorette* at the sessions of parliament 9 & 10 Will. 3. was impeached for misdemeanours, and R. L. and W. S. became his bail: and that the plaintiffs 30 May 1698, assigned over the 174 shares to R. L. and W. S. *viz.* 90 to L. and 84 to S. *pro eorum securitate et ad securandum et indemnificandum* of and from the recognizances: that afterwards the 28th of October 1698 L. and S. were discharged from their recognizances, and that they were no ways damnified thereby; but whether this assignment

If J. S. and several other persons agree that they will enter into partnership with respect to so many shares in a company, that J. S. shall pay the money, and have the custody of the shares, and that he shall not be obliged to keep any of them more than 4 years, but may then sell what shall remain unfold, an assignment of some of the shares by J. S. after the expiration of the 4 years as a security to persons for giving bail for him is not to be considered as such sale or disposition of those shares, as will intitle the other partners to insist that J. S. shall account with them for those shares at the price for which they might have been sold when they were assigned.

A computation of time from the date of a deed commences on the day the deed was dated. vide ante 230, and the cases there cited.

And so does a computation with the date of the deed.

were

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were in law a sale or not, they leave to the discretion of the court.

After this cause had been very long depending, the three judges gave judgment the latter end of this term; but the chief justice was not satisfied. It was agreed by the three judges, that if this partnership had been concerning chattels that had been assignable, that then this assignment to L. and S. would have been a sale within the meaning of the covenant, and would have been with the defendants, because the legal interest being out of the plaintiffs, they had disabled themselves to perform the trust. But they said, this assignment was not like a conveyance in law; that they could not tell what it was; that by it they were not satisfied, that though the shares were put out of the plaintiff's power, but they might have executed the trust notwithstanding. And *Powell* said, the conscience of the cause was with the plaintiffs.

The chief justice doubted, for he thought there was no difference between the cases, for that such assignments must be taken to be within this agreement as the nature of the thing is capable of, whether they were or were not effectual assignments in point of law. So if a man assigns a bond to J. S. and afterwards receives the money of the obligor, if he do not immediately pay it over to the assignee, the assignee may maintain an action of covenant against him upon the word *assignavit*: and that was the case of *Deering v. Farrington*, 1 Mod. 113. 1 Freem. 368. 3 Keb. 304. So if the obligee covenant to assign a bond to J. S. *tel jour*, and will not assign it, or before the day receives the money of the obligor, by which means he has disabled himself to assign it; in either of these cases it is a breach of covenant, and yet in strictness a bond is not assignable.

The three judges were giving judgment for the plaintiffs, and Mr. *Raymond* stood up, and put them in mind of some exceptions he had taken for variances between the declaration and the articles; and particularly of that of the commencement of the four years for the continuance of the partnership, which in the declaration was said to be *with* the day of the date of the contract, in the articles *from* the day of the date of the contract. [The others were mentioned at this time; and I have lost my note-book, in which they were contained.] The court said, that the variances were not material. And the chief justice said, that *a datu* does not exclude the date, and so was the same with *cum datu*; but that *a datu* and *a die datus* were not the same. But *Powell* said, that (a) *a datu* and *a die datus* had been adjudged to be the same in the common pleas. Judgment was given for the plaintiff.

(a) Vide ante
280. and the
cases there cited.

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DEBT on an obligation. The defendant pleaded *R. acc. ante* want of a specification in bar. On demurrer adjudged - 1055.
 ed for the plaintiff that it is not a bar.

Pie *vers.* Cooper.

IN case, the defendant pleaded in abatement, that the plaintiff was an alien enemy, and laid no *venue*: and on demurrer adjudged that it (a) was well pleaded, and the plaintiff might have replied, that he was born in England generally. But if such a matter is pleaded in bar, it (b) must be pleaded with a *venue*, and the plaintiff should reply, that he was born in such a place in England. And in the principal case judgment was given, *quod billa cassetur*.

(a) Semb. acc.
 ante 853, 1014.
 D. acc. 1173.
 (b) D. acc. ante
 853, 1173.

Easter Term

5 Annæ reginæ, B. R. 1706.

Regina *vers.* majorem et aldermannos Norwici.

S. C. Salk. 436. Holt 444.

A return to a mandamus may rely upon several independent causes. Acc. 2 T. R. 456. If those causes are contradictory the return is void. D. acc. 2 T. R. 461.

That a party was elected, and had been disapproved of by a court, whose approbation was essential, and that he was not elected, are contradictory causes. Where the causes are contradictory, a peremptory mandamus shall be granted altho' matter insisted upon in one of the causes by way of avoidance is a good avoidance.

A peremptory mandamus to swear in an officer does not necessarily confer upon him any right to the office. D. acc. 2 Sid. 286.

If a body of men are to choose an officer, notwithstanding the court which is to swear him in have a power of rejecting him, his election is complete as soon as he is chosen by the body: the power of the court is a power not of choosing, but of approving.

Q. Whether procuring by bribery an election to an office not within the statute of 5 & 6 Edw. 6. c. 16. will make the election void.

(a) Vide ante 29 and the books there cited.

A Mandamus to admit one *Dunch* alderman of *Norwich*, and swear him. To this they returned a charter of *Edw. 4.* that the aldermen of *Norwich* *onerarentur et exonerarentur* as the aldermen of *London*; and that in *London* if a person be elected alderman by the ward, the court of aldermen may refuse him; and that *Dunch* was elected by the ward, but was refused by the mayor and aldermen, because he had not qualified himself according to the corporation act, he not having received the sacrament according to the rites of the church of *England*, within a year next before his election; and that he was a turbulent person and factious, and that he procured his election by bribery: and then at the end of the return they returned, *quod non fuit electus*.

It was admitted of all hands, that (a) the matter of *Dunch's* not having received the sacrament within the year before his election made his election void, and had been a sufficient return, if it had stood by itself. But in regard the return was repugnant and contradictory, the court granted a peremptory mandamus. The chief justice said, the court could not believe them, when by their return, first they admit an election and avoid it, and then deny that *Dunch* was elected. A return may contain as many causes as the persons that make the return please, but then they must be distinct independent matters. So here a refusal might be well returned, and also that *Dunch* had not received the sacrament; both which make the election void: but then you come and contradict all the former part of your return, and say *Dunch* was never elected. To avoid this contradiction, it is urged, that the election by the ward is no election; because it is not consummate, till it is approved by the mayor and aldermen. But this chusing by the ward is an

election,

election, for they have several persons to chuse out of; but the mayor and aldermen have no choice, but only approbation; for they cannot chuse. The election and approbation are distinct acts to be done by several parties. And if the election be consummate before the approbation, then the return is contradictory, in returning an excuse why *D.* was not approved, and then returning, that he was never elected.

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Powell justice. If the return be not contradictory, it is very inveigling; the court cannot tell what you rely upon. The election and approbation are two different things, and the election is consummate without the approbation. The power of the bishop to approve the presentee, is different from the presentation. And so is the nomination of one (where the case is, that *J. S.* is to present such a one as *J. N.* shall nominate) from the presentation: and the presentation is over before the approbation, and the nomination before the presentation. So here the election is over before the approbation. *Non fuit electus* in the return, must be understood, that *Dunch* was never elected by the ward.

Powys and *Gould* agreed. But *Powys* thought (upon the case which had been cited out of 1 *Sid.* 286. where, though the return was insufficient, yet the court would not grant a peremptory *mandamus*, because the right was against the person that sued the *mandamus*; but ordered the right to be tried) that it appearing to them upon the return, that *Dunch's* election was void on the corporation act, they ought not to grant a peremptory *mandamus*.

But the chief justice said, it did not appear; for the court could not tell what to believe, when the return was contradictory to itself. And he said, a peremptory *mandamus* would not make the election good, upon an information, the election might be avoided, and *Dunch* turned out.

Powell. The return can never be made good.

Upon the argument of this case the chief justice said, that as to the procuring his election by bribery, it would be a question whether that would make the election void, unless it were to an office within the statute of 5 & 6 Ed. 6. c. 16. for though elections ought to be free, yet an elector might use his liberty to vote for him that had given him money. And he remembered a case between *Blancard* and *Galley*, *Salk.* 411. where in an action of debt upon a bond conditioned for paying part of the profits of the office of provost marshal within the island of *Barbadoes*, it was resolved, that if it had concerned the same office in *England*, the bond had

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been void by the statute of *Edw. 6.* but the office being in *Barbadoes*, the bond was held good, though it was concerning the administration of justice.

(a) Vide March
179.

He said, the method of chusing aldermen in *London* was thus. The inhabitants of the ward chuse two, and if the court of aldermen think them insufficient, they may reject them, and order the ward to chuse again. And he said, that in the lord chief justice *Kelynge's* time, in the case of one *Mr. Swallow*, (a) the custom of *London* was certified to be, that if a man be chosen alderman, and refuse to serve, the court of aldermen may commit him to *Newgate* as for a contempt; but if he fines, then the way is to swear him alderman, and then discharge him by consent.

Sheriff of Middlesex's Case.

A *Latitat* issued out of the king's bench to the sheriff, to arrest a man, and the sheriff returned, that the man was lifted according to the act 4 *Ann. c. 10. et ea occasione capere non possum.*

Mr. serjeant Broderick moved against the sheriff, because, as he pretended, he ought to have arrested the man; because by the act the plaintiff had liberty to go on to judgment and execution against any thing but the defendant's body, and then the court should discharge him on common bail, if he appeared to them to be lifted regularly; but the sheriff should not take upon him to determine whether he was regularly lifted. But the court upon consideration held it to be a good return, and that this act worked by way of a *superfides* to any process to be issued against persons lifted, and that if the sheriff should arrest such a person, he would be liable to an action of false imprisonment. And they said it appeared, that the act did not intend, that the man should be arrested, and then discharged on common bail, by the proviso, "that the plaintiff upon leaving notice in writing at the defendant's place of abode, or giving to the defendant such notice in writing of the plaintiff's cause of action, might file common bail for the defendant, and proceed to judgment, &c." That in case the men were not regularly and fairly lifted, this was a false return, and the plaintiff had his remedy against the sheriff by action for the false return.

My Lord Banbury's case.

S. C. Salk. 512.

A Motion was made on his behalf for a *superfedeas* to a *latitat*, which was issued out of the king's bench against him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplification of the judgment in the indictment against my lord in this court, *ante* 10, and the letters patent of creation, and the *affidavit* that my lord was the same person in the record of the judgment. And it was also pretended, that if my lord should put in bail, he (a) would be estopped to plead his peerage. But the court denied the motion, and the chief justice said, they could not take notice, that this *Charles Knollys* is earl of *Banbury*; that there was a difference between this case, and the case of a peer that had sat in the house of lords. If my lord had ever been summoned to parliament, and had a writ to shew, and there was no dispute about the identity of the person, it would have been reasonable to have granted a *superfedeas*; but in this case of a lord that has never sat there, they could not do it, for they could not try peerage upon a motion, but his lordship might plead it, and pray a *superfedeas*.

A peer by patent who is arrested by his christian and surname as a commoner shall not be discharged on common bail if he has never sat in parliament.

Semb. acc.
Salk. 3. 7 Mod.
38. vide Str.
985.

Powell said, that if in the *capias* my lord had been named peer, it (b) should have been superseded. For the law would never intend, but a peer had something to answer the action, and the body is made liable only in defect of that, and that was the ground of that privilege of peers. And the abbots of *England* had the same privilege for the same reason. But here the writ is against *Charles Knollys*, and we cannot take notice of his peerage.

(b) R. acc. 1.
Vent. 298.

(a) Vide 7 Mod. 38, 1 Salk. 3.

Brown *vers.* Benn et alios.

A Motion was made for a prohibition to the court of admiralty, in a suit there by seamen for their wages, upon a suggestion that the court refused to allow the defendant's allegation, that the place upon the arrival at which the plaintiffs intitled themselves was not a port of delivery; and that they refused to receive the allegation, unless the defendant would bring the money demanded into court.

But the chief justice and *Powell* held, that the admiralty court were the judges of that matter, and that if they did not do the defendant right, his only remedy was by appeal; but it was no ground for a prohibition: that the jurisdiction of the court of admiralty in case of seamen's wages was an ancient concurrent jurisdiction, as ancient as the constitution

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tion of the admiralty court here: that you cannot appeal in the court of admiralty before definitive sentence, for a *gravamen*, as you may in the ecclesiastical court.

The suit here was for wages, upon the arrival of the ship at *Guinea*. *Powell* justice said, he remembered a case of the like nature, where a suit was commenced in the court of admiralty by seamen for their wages, upon the arrival of the ship at *Newfoundland*: and though the merchants all held it no port of delivery, yet the court of admiralty held the contrary. And so did the court of common pleas upon a prohibition.

Regina vers. Atkinson et alium.

S. C. Salk. 382. 11 Mod. 79. Indictment post vol. 3. p. 61. Cr. Circ. Aff. 416.

Several persons
may be indicted
jointly for ex-
tortion. vide
Burr. 980.
T. R. 98.
Str. 921.

ATKINSON and another person were indicted, for that they being receivers of the queen's tax, did extort money out of several persons *colore officii*. It was moved in arrest of judgment, that they could not be indicted jointly. And to prove it, was cited 2 *Roll. Abr.* 81. pl. 6. an indictment against four persons for using of a trade, and the indictment was, that they four, *et uterque eorum*, used the trade; and the indictment was quashed, because the using by the one could not be the using by the other. (a) 1 *Ventr.* 302. The same case agreed. But note, the principal case there was upon the statute of maintenance, an indictment upon that statute against two, and one only found guilty: and it was moved in arrest of judgment, that the verdict did not maintain the indictment, and the case of the trade before cited and agreed; but resolved that that was an offence two might join in, or it might be several, as in trespass: otherwise of exercising a trade.

Holt chief justice. For battery or extortion, which are crimes at common law, two persons may be indicted jointly; but the exercising of a trade not having been educated in it as an apprentice seems to differ, because the forfeitures are distinct, and that which makes the crime is several, viz. the not having been apprentices. He said also, that *baron* and *feme* could not be indicted for exercising a trade not being qualified, because it is the exercise of the husband. If the wife be qualified, that qualifies the husband, but still it is the exercise of the husband.

Serjeant *Broderick* cited another case inforcing the objection, viz. an indictment against six persons for opening their shops upon a day appointed to be kept holy by proclamation, and it was quashed, because the six defendants

(a) But note, by serjeant *Broderick*, if two persons employ a man in a trade, that is a joint exercising the trade, and they must be indicted jointly. Note to the first Edition.

could not be joined in one indictment: it was a case in the chief justice's time, and was now agreed by him. Judgment was given for the queen.

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Facquire vers. Kynaston.

ACTION upon several promises, the defendant pleaded in abatement that the promises in the declaration were made *tiel jour*, which was after the action brought, and traversed that they were made before, and the plaintiff demurred.

Defendant cannot plead in abatement what he might give in evidence on the general issue. Vide ante 345. 693. 1207.

Mr. *Brantways* to maintain the plea argued, that though this matter was pleadable in bar, yet many things that might be pleaded in bar, might also be pleaded in abatement; as (a) property in a stranger, or *pris en auter lieu*, may be pleaded either in bar or abatement in replevin. The chief justice agreed the cases, but said they differed from this, first, because those matters could not be given in evidence upon *non cepit*, the general issue in replevin, as this might upon *non assumpsit*, and that if there had been any fact to support this plea, the defendant would have pleaded the general issue: secondly, because the matter of this plea is new matter out of the compass of the plaintiff's action. And the defendant was ordered to answer over.

Thus in an action of assumpsit, the defendant cannot plead in abatement that the promise was made after the commencement of the action, and not before.

(a) Vide ante 984. and the books there cited.

Queen vers. the Justices of the Peace of the liberty of St. Peter's in York.

A *Mandamus* was directed to them, reciting, that whereas an ancient bridge called *Tadcaster* bridge, situate partly in the county of the city of *York*, and partly in the West-riding of the county of *York*, was lately fallen down, and that it ought to be repaired by the inhabitants of the county of the city, and of the West-riding of the county respectively; and that it was so done by them, except only the inhabitants of the liberty of *St. Peter's* in the city and county of the city; and that the inhabitants of the city laid out in the repair of their part 1449*l.* and that the share of the inhabitants of the liberty of *St. Peter's* came to 30*l.* which they had refused to pay, and the justices refused to make a rate for it according to the form of the (a) statute; and therefore commanded them to make and impose a rate upon the inhabitants within the liberty in the city and county of the city, for such their part of the charges about the building and repairing of the bridge according to the form of the statute, and cause it to be collected and levied and paid to the mayor and citizens, or their attorney or treasurer to their use, &c. To this the justices returned, that the city of

If a new district is added to a city, the inhabitants of the city must repair the public bridges within such district.

The justices of a particular district within a city cannot make a rate for the repairing of a public bridge: such rate must be made by the justices of the city at large. vide 2 Inst. 697.

Q. Whether such a rate can be made after the bridge is repaired. vide ante 1009.

(a) 22 H. 8. c. 5.

K k 4

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York is an ancient city, and the citizens and inhabitants of, time out of mind, have been a body politic; and that the city of York and suburbs and precincts of the same, 11 February 27 Hen. 6. and long before, were a county by itself, and called the county of the city of York; and that the hundred of *Anistie* was part of the West-riding of the county of York, and that Hen. 6. 11 February 27th of his reign, by his letters patent granted, that the hundred of *Anistie* should be annexed to the county of the city of York, and that the city and suburbs of York, and the precincts of the hundred of *Anistie*, should be the county of the city of York, divided from the county of York, saving to the church of York, and the archbishop, dean and chapter of the same, and to all communities ecclesiastical and temporal, and all other persons, all manner of franchises, privileges, rights, commodities, and customs, to them or any of them of right belonging, *ita quod* by that grant no prejudice in any manner should be done to them, in *possessions, seu proprietate* of any liberties, franchises, privileges, rights, commodities, or customs, of which they were then seised or possessed, or which did then belong to them: that the liberty of St. Peter's in York in the city and county of the said city is, and at the making of the said letters patent and long before was, an ancient liberty, of which the dean and chapter of York is seised in fee, and that by all that time they had justices of peace there, and that the justices of the peace of the county of York, or of the county of the city of York, had nothing to do there: that the part of the bridge in question at the making of the letters patent lay in the hundred of *Anistie*, out of the liberty of St. Peter's, and out of the jurisdiction of the justices of peace of that liberty, and before that time was, and ought to be, repaired by the inhabitants of the West-riding of the county of York, and from that time, and at the time of making the act of 22 H. 8. c. 5. and ever since was used, and ought to be repaired by the inhabitants of the city and of the hundred of *Anistie* without any contribution from the inhabitants of the liberty, and that it was known, and could be easily proved at the time of making the said act, and is known and can be easily proved to be so, &c.

In this case it was resolved, first, that the return was ill in substance, because this charge came upon the city by uniting the hundred of *Anistie* to it, and consequently the liberty of St. Peter's, which is part of the city, must be subject to the charge as well as the rest of the city. That the (a) act of 22 Hen. 8. c. 5. had taken away all exemptions, and franchises, and made them all liable to be charged: that there can no reason be given for exempting the liberty of St. Peter's, which would not as well hold for exempt-

(a) D. acc.
2 Inst. 704.
1 Hawk. c. 77.
c. 18.

ing all the rest of the city, and lay the whole burthen on the hundred of *Amstie*.

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Powell agreed. And he said, that as to the persons, who of right ought to repair bridges, the act of 22 H. 8. c. 5. was only declaratory of the common law; which *Holt* chief justice agreed, and said, that the (a) charge of repairing bridges was incumbent on the county by common law, unless where particular persons were charged with it by tenure or prescription. What was new in it, was the appointing the method of doing it; that a hundred might be charged with the repair of a bridge by prescription, but that was not the case here; for the hundred had not used to repair the bridge, but the West-riding of the county: that upon the annexing of this hundred to the county of the city, there might have been an agreement made between the corporation and the dean and chapter, that they should have been exempted from the charges of repairing this bridge, but if there were any such, that ought to have been returned: that there had been no instance of the liberties contributing, because this bridge had never been repaired before.

(a) R. acc. 6
Mod. 307. Burr,
2594. Bl. 685.
D. acc. 2 inst.
701.

Serjeant *Wynne* against the return said, that the latter of it, that it was known, that the county of the city ought to repair it, was ill; because it did not say, how they were obliged to repair it, by tenure or prescription; for that was what was meant by the *ought* in the act of parliament. 22 H. 8. c. 5. f. 2.

But then the writ was quashed, because by the act 22 H. 8. c. 5. f. 4. the justices of the liberty had no power to assess or rate the inhabitants of the liberty, or to intermeddle in this matter; but the justices of the county of the city. And the chief justice said, that the justices of the county of the city had power in this case, to summon the constables of the parishes within the liberty, out of the liberty; and so the justices of a county had, constables within a corporation, where corporations are part of a county; for it is they must put this act in execution, and not the justices of the corporation.

There was another objection taken to the writ, that it would not lie in this case, because the money was laid out first; whereas by the act of parliament 22 H. 8. c. 5. the rate ought to have been made first, like the case of overseers of the poor on the 43 *El.* and *Towney's* case ante 1009. cited, where a writ of *mandamus* to make a rate to reimburse an overseer of the poor was quashed, because the rate ought to have been made first.

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The court seemed to be of opinion, that the money might be laid out, before a rate made; and that the justices of peace might make a rate to reimburse the money. But then the chief justice said, that the persons that were to be charged to the repair of the bridge, ought to be made privy to the laying out of the money; and the rate to be made, ought to be for the repairing the bridge, and not for reimbursing money laid out in the repair of a bridge: and that in the case of an overseer of the poor the justices might order a rate to be made for the relief of the poor, and out of that the overseer might be reimbursed the money he had laid out, and that that was the regular way; but the rate must not be for reimbursing the overseer.

I did not take this to be so certainly resolved, but the other being a plain exception, the court, as I apprehended, went upon that,

Atwood *vers.* Burr.

If a judicial writ is entered on the roll, an alias may be sued out thereon before it is returned. Vide ante 1142.

An attorney cannot sue out a *scire facias* against bail under the warrant of attorney in the action against the principal. S. C. Salk. 89. 603.

And a judgment inde without a new warrant is erroneous. S. C. Salk. 89. 603. vide post. 1532. Bl. 453.

THIS cause was not stirred in from Michaelmas 1 of this queen till Hilary 4^o being last term. And then serjeant Broderick took the old exception, that there was a discontinuance, because there was no return to the first *scire facias*. But Mr. Eyre for the defendant in error insisted upon it, that this was good as an *alias scire facias*, though the first was not returned; and cited *Rast. Enter.* 326. b. 327. And the lord chief justice Holt said, that the first writ, when awarded, should be entred on the roll, for the defendant has a day by the roll; and therefore the writ is depending before the return of it: and therefore in this, if there had been such an entry it had been good, with this award of another, *sicut prius*, &c. And it was, with very little said more, adjourned till this term. And now this term, Pasch. 5 Ann. serjeant Broderick insisted, that the judgment ought to be reversed for the prolixity of the pleadings, because they had sent the record and proceedings against the principal, and then the record and proceedings against the bail was made dependant upon the other, and not severable from it, which he said was not to be countenanced in an inferior court: and cited *Cro. Car.* 164. *Fryer v. Fawkenor*, where judgment of an inferior court was reversed for the absurdities and prolixities in the pleadings. But the court answered, that there all the reasons and arguments were entred at large, and therefore that case differed much from this. Then he took another exception, that there was no warrant of attorney to appear to the *scire facias*, and the party appeared *per attornatum prædictum*. To which Mr. Eyre answered, that this was only a fault in certifying the record by them below, for which the plaintiff should not suffer. But the lord chief justice Holt said, that the

the plaintiff might pray a *scire facias* without an attorney; but when he comes to pray judgment upon it, he does it by attorney, and there is no warrant of attorney before, and therefore that is error. And of that opinion was all the court, and judgment was reversed, *nisi, &c. die Lunæ Apr. 22 Pasch. 5 Annæ reginæ.*

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v.
BURR.

Knight *vers.* Barnaby.

S. C. Salk. 670. Holt 712.

THE plaintiff brought an action of trespass, assault battery against the defendant in *Middlesex*. The defendant upon the common affidavit had a rule to change the venue into *Kent, nisi, &c.* And now Sir James Mountague moved to set aside that rule, because the plaintiff was clerk of the assises of the *Norfolk* circuit, and by consequence an officer of this court. And the court was of that opinion, because the king's bench frequently makes rules on clerks to return *posseas, &c.* and therefore that rule was discharged.

Any officer of the courts at Westminster may when plaintiff in a transitory action lay his venue in *Middlesex*. R. acc. Burr. 2027. Bl. 1065. vide 1 Will. 159. Str. 822.

The clerks of assise are officers of the courts at Westminster.

Adams *vers.* the terretenants of Savage.

S. C. Salk. 601. 6 Mod. 226.

JOHN Adams administrator of Sarah Adams, who died intestate, sued out a *scire facias* bearing teste the 19th of May, the third year of this queen, and returnable *die Lunæ proxime post crastinum ascensionis Domini* next following, upon a judgment given for the said Sarah Adams in this court *die Sabbati proxime post tres septimanas Paschæ* 34 Car. 2. against Sir George Savage of Bloxworth in the county of Dorset for 200*l.* debt and 40*s.* damages and costs, against the terretenants of the lands of which Sir George Savage was seised in fee the day of the judgment given.

Intr. Pasch. 3
Ann. B. R.
Rot. 231.

In a *scire facias* on a judgment in a personal action against terretenants. 2. Whether a plea that there are other terretenants in the county not named in the return can conclude with a prayer that the writ may be

quashed. S. C. 6. but with some difference. 3 Salk. 321. 6 Mod. 199. vide 2 Roll. Rep. 53.

If one person in particular is returned terretenant of particular lands, none of the other terretenants can join with him in pleading any thing with respect to those lands.

A plea which is bad as to one of the persons pleading it, is bad as to all. R. acc. Str. 309.

General non-tenure cannot be pleaded to such a *scire facias* either expressly or by implication.

2. Whether a tenant for years may not be considered as terretenant upon such a *scire facias*. S. C. 3 Salk. 321.

At the day of the return of the *scire facias* as well the plaintiff John Adams as Daniel Sadler and Philippa his wife, and several other persons returned by the sheriff to be tenants of the land of which Sir George Savage was seised in fee the day of the judgment, summoned, and they appear by their attorneys; and in particular the said Daniel Sadler and Philippa his wife, who were returned tenants of the capital mansion-house with the appurtenances called *Bloxworth-house*, and of the manor of *Bloxworth, &c.* in the said

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Terretenants of
SAVAGE.

Suggestion of the
death of the in-
testate and grant
of administra-
tion.

Profers in curia.

Non tenure plead-
ed by implicati-
on.

said county, of which the said Sir George Savage was seised in fee the day of the judgment given. *Et super hoc idem Johannes Adams dicit, quod post judicium prædictum in forma prædicta redditum scilicet 10 die Maii anno regni Domini W. 3. nuper regis Angliæ, &c. 12. apud Bloxworth prædictum in comitatu prædicto, prædicta Sara Adams obiit mortem, et administratio omnium et singulorum bonorum et catallorum jurium et creditorum quæ fuerunt prædictas Saræ tempore mortis suæ, per Thomam providentia divina Cantuariensem archiepiscopum totius Angliæ primatem et metropolitenum 18 die Maii anno Domini 1704, apud London eisdem Johanni debito legis forma commissa fuit. Et prædictus Johannes Adams proferat in curia literas administratorias prædictas Saras, per quas satis liquet curiæ hic ipsum Johannem Adams fore administratorem, et inde habere administrationem, &c. Et petit idem Johannes Adams executionem versus præfatum Danielem Sadler, and the other persons returned terretenants, de debito et damnis prædictis de terris et tenementis prædictis levandis sibi adjudicari, &c. Et prædictus Daniel Sadler et Philippa uxor ejus, and the rest of the terretenants, at the day of the return of the scire facias solemniter exacti per P. T. attornatum suum prædictum veniunt et petunt judicium de brevi de scire facias præfato vicecomiti Dorset directo in forma prædicta retornato: quia dicunt quod quidam Georgius Trenchard armiger est, et die impetrationis ejusdem brevis de scire facias et ante fuit, tenens ut de libero tenemento de manerio de Bloxworth cum pertinentiis in comitatu prædicto in retorno prædicto mentionato, et hoc parati sunt verificare, unde ex quo prædictus Georgius Trenchard in retorno prædicti brevis de scire facias non nominatus seu retornatus est tenens ejusdem manerii de B. prædicti cum pertinentiis, iidem Daniel Sadler et Philippa uxor ejus, and the rest of the terretenants, petunt judicium de brevi illo, et quod breve illud cassetur. J. Darnall. To which plea the plaintiff demurred, and the defendant joined in demurrer.*

The exception which was took to this plea by the plaintiff's counsel Mr. Eyre, was, that it concluded ill, for it ought to conclude *si* the defendants *respondere compelli debeant*; and could not be pleaded in abatement, unless the defendants give the plaintiff a better writ, which in this case they do not, for a new writ must be the same, and the fault is in the sheriff, in omitting some of the terretenants in the return. So is *M. 40 & 41 Eliz. Clerk v. Hardwick. Cro. Eliz. 750. M. 16 Jac. 1. Michel v. Sir John Crofts and others. Cro. Jac. 506. 2 Ro. Rep. 41, 53. Moore 524.*

Mr. serjeant Darnall for the defendant insisted upon it, that the precedents were both ways, and relied on *Co. Intr. 624.*

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The cause being in the paper for judgment, *Mich.* 3. of this queen; the judges did not seem to be altogether unanimous as to the exception above-mentioned. *Powell* justice took it to be a settled rule, that the defendant should never abate the plaintiff's writ without giving him a better, which in this case he cannot do, there being no defect in the writ, but in the sheriff's return; but because execution ought to be awarded against all the terre-tenants equally, which cannot be done till all of them are returned warned, and before the court, therefore this is a good plea in delay of the execution, and ought to be pleaded *si respondere compelli debeant*; but cannot be pleaded in abatement of the writ. For the court cannot give judgment, that the writ for this defect shall abate, but the court must award another writ, and the terretenants returned upon the first writ must have the same day given them with the return of the new writ. So is 11 E. 2. *Fitzb. Briefs* 266. 2 *Saund.* 8, 9. *Jefferson and Dawson.* And *Mich.* 1 *Wil. & Mar. B. R. Prynn v. Slaughter.* 2 *Ventr.* 105.

Holt chief justice said, that where the terre-tenant omitted is tenant of lands in another county, such a plea can never be pleaded in abatement: because the sheriff has perfectly done his duty in execution of the first writ, and could do no more but summons the terre-tenants in his county: and therefore in such case the plaintiff must sue out a new writ directed to the sheriff of that other county where the other lands, &c. lie. And therefore in such case to plead that matter in abatement would be very improper, but it ought to be pleaded with a *si respondere compelli debeant*, &c. And so are the cases of 2 *Saund.* 8, 9. and 2 *Ventr.* 105. the terre-tenants not named being of lands in another county. But where the terretenants not returned are of lands in the same county, the precedents are both ways; though it must not be intended that the king's bench can give judgment to abate the writ, but only to stay till the other terre-tenant is brought in. [See *Moore* 429. *Cra. Eliz.* 506. *Goldsb.* 160. pl. 92. *Dame Gresham's case.*]

But then the lord chief justice *Holt* took an exception to the plea, which he said must be fatal, which was, that *Sadler* and his wife were returned tenants of the manor of *Bloxworth*, then no body but they can plead any thing in respect of that manor, of which they are returned tenants. For if in a *scire facias*, &c. *A.* is returned tenant of *Blackacre*, and *B.* of *Whiteacre*, *A.* can plead nothing as to *Whiteacre*, nor *B.* as to *Blackacre*; then in this case, when all the terretenants returned join in this plea with *Sadler* and his wife, it vitiates the whole plea. Indeed if *Trenchard* had been jointenant with *Sadler* and his wife, and not returned nor summoned; *Sadler* and his wife might have pleaded it, but the other terre-tenants could not join in such plea,

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plea, because they have nothing to do with the manor of which Sadler and his wife are returned tenants.

2. If Sadler and his wife had pleaded this, it had been naught; because it had been but a plea of general *non-tenure*, and that too but by implication. In a *scire facias* on judgment in a real action, special *non-tenure* may be pleaded. 8 Edw. 4. 19. 9 Hen. 5. 11. But in a *scire facias* on a judgment in a personal action the terre-tenant cannot plead *non-tenure* by implication. To all which the other three judges, viz. Powell, Powys, and Gould agreed, and therefore a *respondes oster* was awarded.

Note, the lord chief justice Holt said further in this case, that it was a question whether a tenant for years was not a sufficient terre-tenant to be returned by the sheriff in a *scire facias* on a judgment in a personal action. In *Owen* 134. *Kemp et alii v. Lawrence*; a tenant for years pleads in bar of a *scire facias*, and as that case is reported in 2 Brownl. 244. it is doubted whether it is good or not. And in 2 Saund. 20, 21. a lease for years in the terretenant returned in the *scire facias* is pleaded in bar. Now if the law is so, that a tenant for years is a sufficient tenant in such a case, this plea is ill; because, notwithstanding *Trenchard* might be tenant of the freehold, yet Sadler and his wife might be tenants for years. But as to that neither he nor the other judges gave any positive opinion. Mr. Rob. Eyre counsel for the plaintiff, Mr. serjeant Darnall for the defendants.

Intr. Hil.
2 Ann. B. R.
Rot. 261.

In an action upon the recognizance of bail to an action if the defendant pleads that no *capias ad satisfaciendum* was sued out against the principal before the commencement of the action, and the plaintiff in his replication sets one out, a rejoinder that before it was sued out returned and filed, a writ

of error was brought on the judgment against the principal is a departure. S. C. 6 Mod. 139.

Notwithstanding a writ of error is allowed upon a judgment on the day on which a *capias ad satisfaciendum* upon it is returnable, the *capias ad satisfaciendum* may be returned and filed, S. C. 6 Mod. 139. Salk. 321. Vide Str. 1186. 1 Wils. 16. ante 342. Sur. 867. Bl. 1183. And the plaintiff may immediately proceed against the bail.

Parkins *vers.* Wilson,

Pleadings post vol. 3. p. 346.

Middlesex, ff. *M*emorandum quod alias scilicet die Lunæ proxime post quindenam sancti Martini in termino sancti Michaelis ultimo præterito, coram domina regina apud Westmonasterium venit Thomas Parkins per Franciscum Hutchinson attornatum suum, et prætulit hic in curia dictæ dominae reginae tunc ibidem quondam billam suam, versus Mattheum Wilson in custodia marescalli, &c. de placito debiti, et sunt plegii de prosequendo scilicet J. D. et R. R. quæ quidem billa sequitur in hæc verba: scilicet Middlesex. ff. Tho. Parkins queritur de Matheo Wilson in custodia marescalli marescalli dominae reginae coram ipsa regina existente, de placito quod reddat ei 25*li.* et 15*s.* legalis monetae Angliæ, quas ei debet et injuste detinet, pro eo videlicet quod cum prædictus Thomas Par-

kins alias scilicet hoc instanti termino in curia domine reginæ coram ipsa regina apud Westmonasterium (eadem curia apud Westmonasterium in comitatu Middlesex tunc existente) per billam sine brevi dictas dominas reginæ, ac per iudicium ejusdem curiæ, recuperasset versus quendam Jonathanem Woollaston generosum 25l. et 15s. pro damnis suis, quas sustinisset tam occasione non performance quarundam promissionum et assumptionum eidem Thomae per præfatum Jonathanem nuper factorum, quam promissis et custagiis suis per ipsum circa factam suam in ea parte appositis, unde idem Jonathan convictus est, prout per recordum inde in curia dictas dominas reginæ coram ipsa regina apud Westmonasterium prædictum residens plenius liquet et apparet: ac cum prædictus Matthæus Wilson et quidam B. C. per nomina Matthæi Wilson de parochia sancti Pauli Covent Garden coqui, et B. C. de parochia sancti Clementis Dacorum generosi, alias scilicet termino Paschæ ultimo præterito, in eadem curia dictas dominas reginæ coram ipsa regina apud Westmonasterium, personaliter venissent et devenissent plegii et manucaptores, et uterque eorum pro se devenisset plegius et manucaptor, pro præfato Jonathanem, quod si contingeret ipsum Jonathanem in placito prædicto convinci, tunc iidem M. et B. concessissent, et uterque eorum pro se concessisset, omnia hujusmodi damna, missa, et custagia, quas præfato Thomae Parkins in ea parte adjudicaretur, de terris et catallis suis et eorum utriusque fieri, et ad opus præfati Thomae Parkins proprium, levari, si contingeret damna illa præfato Thomae (ipsum Jonathanem non) solvere, aut se prisonæ mareschalli mareschalcias dictas dominas reginæ coram ipsa regina ea occasione non reddere: et idem Thomas dicit quod prædictus Jonathan damna illa præfato Thomae nondum solvit, nec seipsum prisonæ mareschalli mareschalcias dictas dominas reginæ coram ipsa regina ea occasione reddidit; per quod actio accrevit eidem Thomae ad exigendum et habendum de præfato Matthæo prædicto 25l. et 15s. prædictus tamen Matthæus licet saepius requisitus, &c. prædictas 25l. et 15s. eidem Thomae nondum solvit; sed illos ei solvi bucusque omnino contradixit, et adhuc contradicit, ad damnum ipsius Thomae 30l. et inde producit factam, &c. Cum hoc quod idem Thomas verificare vult, quod prædictus Matthæus Wilson unus plegiorum et manucaptorum pro prædicto Jonathanem devenisse superius mentionatus, et prædictus Matthæus Wilson modo defendens, sunt una et eadem persona, et non alia, neque diversa; quodque prædictus Thomas in recordo prædicto mentionatus, et prædictus Thomas modo querens, sunt una et eadem persona, et non alia, neque diversa; quodque iudicium prædictum in suis pleno robore, vigore, et effectu adhuc remanet minime reversatum, annibilationum, sive satisfactum.

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The judgment
against the prin-
cipal in case.

The bail's recog-
nizance in the
king's bench.

Averment

The defendant Wilson pleaded in bar, that after the giving the said judgment against the said Jonathan Woollaston, and before the day of the exhibiting the plaintiff's bill, no

No capias ad satisfaciendum
pleaded.

capias

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capias ad satisfaciendum upon the said judgment against the said *Woolleston* was prosecuted and returned in the queen's bench, &c.

Replication of a
capias ad satis-
faciendum sued
and returned.

The plaintiff *Parkins* replied, that after the giving the said judgment against the said *Woolleston*, and before the exhibiting this bill, viz. 10 of November the second of this queen, the said plaintiff did sue out of the king's bench a *capias ad satisfaciendum* against the said *Woolleston*, returnable die Lunæ proxime post octavas sancti Martini, &c. at which day the sheriff returned, that the said *Jonathan Woolleston* non fuit inventus in balliva sua, prout per breve de *capias ad satisfaciendum*, et prædictam retornam brevis illius in the said queen's bench apud *Westmonasterium*, de recordo, residentia plenius liquet et apparet; et hoc, &c.

Rejoinder that
the defendant
in the principal
action sued error
on the judgment
before the *capias*
ad satisfaciendum
was prosecuted,
returned, and
filed.

The defendant rejoined in this manner! Et prædictus *Mattheus Wilson* dicit quod post redditionem judicii prædicti in narratione prædicta specificati, et ante prædictum breve de *capias ad satisfaciendum* de vel super judicio prædicto versus prædictum *Jonathanem Wilson* prosecutum retornatum et affilatum fuit in curia dictae dominae reginae nunc coram ipsa regina apud *Westmonasterium* prædictum scilicet 20 die Novembris anno regni dictae dominae reginae nunc secundo, ipse idem *Jonathan* pro reversione judicii prædicti prosecutus fuit extra curiam cancellariae dictae dominae reginae apud *Westmonasterium* prædictum in comitatu *Middlesexiae* tunc existentem, quoddam breve dictae dominae reginae de errore corrigendo in recordo et processu, acetiã in redditione judicii illius, directum dilecto et fideli dictae dominae reginae *Johanni Hale* militi tunc et adhuc capitali justiciario ipsius dominae reginae ad placita coram ipsa regina tenenda assignato, per quod quidem breve dicta domina regina præfate capitali justiciario suo mandavit, quod si judicium inde redditum fuit, tunc recordum et processum loquelas prædictas cum omnibus ea tangentibus coram justiciariis suis de communi banco et baronibus suis de scaccario de gradu de la coise in camera scaccarii dictae dominae reginae apud *Westmonasterium* die Sabati, videlicet 27 die tunc instantis mensis Novembris, venire faceret, ut dicti justiciarii de communi banco et barones de scaccario, visis et examinatis recordo et processu prædictis, ulterius inde in ea parte fieri facerant, quod de jure et secundum formam statuti in hujusmodi casu aditi et provisum foret faciendum, virtute cujus quidem brevis de errore corrigendo idem capitalis justiciarius postea, scilicet eodem 27 die Novembris prædicti, transcriptum recordi et processus loquelas et judicii prædictorum cum omnibus ea tangentibus coram præfatis justiciariis dictae dominae reginae de communi banco et baronibus de scaccario de gradu de la coise in camera scaccarii apud *Westmonasterium* prædictum transmissit, ubi eadem adhuc remanent, et quod prædictum breve de errore corrigendo in eadem camera scaccarii prædicti adhuc pandet indeterminatum, et judicium prædictum

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praedictum in eadem curia dictae dominae reginae nunc coram ipsa regina adhuc in pleno suo robore remanet minime annullatum, prout per recordum inde in eadem curia dictae dominae reginae nunc coram ipsa regina plenius liquet et apparet: et idem *Mattheus* ulterius dicit, quod post prosecutionem praedicti brevis de errore corrigendo, et ante retornam inde necnon ante praedictum breve de capias ad satisfaciendum de vel super iudicio praedicto versus praesatum *Jonathanem Wilson* persecutum retornatum et affilatum fuit in curia dictae dominae reginae nunc coram ipsa regina apud *Westmonasterium* praedictum, scilicet 22 die Novembris anno regni dictae dominae reginae nunc secundo, idem *Mattheus Wilson*, et quidam *Booth Chadderton*, et *Ricardus Woollasson*, per nomina *Booth Chadderton de Stanbop-street* in parochia sancti Clementis Dacorum in comitatu *Middlesexiae* generosi, *Matthei Wilson de York-street* in parochia sancti Pauli Covent Garden in comitatu praedicto coqui, et *Ricardi Woollasson de Wormley* in comitatu *Hertford* armigeri, in propriis personis suis venerunt in praedictam curiam dictae dominae reginae nunc coram ipsa regina apud *Westmonasterium*, et secundum formam statuti pro evitacione minime necessariarum dilationum executionum inde editi et provis, recognoverunt se debere, et quilibet eorum recognovit se debere, praedicto *Thomae Parkins* 51 l. et 10 s. legalis monetae Angliae, solvendos eidem *Thomae*, executoribus vel assignatis suis, et nisi fecerint, iidem *B. M.* et *R.* concesserunt, et quilibet eorum concessit pro se, praedictos 51 l. et 10 s. de terris et catallis suis, et eorum cujuslibet, fieri et ad opus dicti *Thomae* levari; sub conditione tamen, quod si praedictus *Jonathan* prosequeretur praedictum breve de errore cum effectu, ac si iudicium praedictum affirmatum foret versus praedictum *Jonathanem*, tunc si idem *Jonathan* satisfaceret et solveret dicto *Thomae* damna praedicta, ac etiam omnia talia custodia et damna qualia adjudicata forent dicto *Thomae* occasione dilationis executionis suae super iudicio praedicto praetextu prosecutionis dicti brevis de errore, tunc recognitio illa vacua foret, et nullius effectus; prout per recordum inde in praedicta curia dictae dominae reginae nunc coram ipsa regina apud *Westmonasterium* remanens plenius apparet: et hoc idem *Mattheus* paratus est verificare, unde (ut prius) petit iudicium, et quod praedictus *Thomas P.* ab actione sua praedicta inde versus eundem *Mattheum* habenda praecludatur, &c.

Bail in error!

Ri. Acherley.

To this rejoinder the plaintiff demurred generally, and the defendant joined in demurrer, and adjudged for the plaintiff Easter term 3 Ann. B. R. because the rejoinder is a departure from the bar. Cro. Car. 76. This term a motion

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tion was made by *Woollaston* the defendant in the principal action, to set aside this *capias ad satisfaciendum* as irregular, because it was sued out returnable *die Lunæ proxime post octabas sancti Martini*, which was the 22d of November, and that very day the writ of error sued out by *Woollaston* the 20th was allowed: after which the *capias ad satisfaciendum* was filed, but returned the same day. And adjudged, this *capias ad satisfaciendum* was well sued out to charge the bail, and the motion was denied *May 5. Pasch. 3 Ann. B. R. Parkins v. Woollaston.* *Raymond* for the plaintiff, *Acherley* for the defendant.

The principal Officers in the Law.

Pasch. 5 Annæ reginæ, A. D. 1706.

THE right honourable William Cowper *esquire*, lord keeper of the great seal of England, which was delivered to him by the queen in council at St. James's, October 2, 1705. being then one of her majesty's counsel at law.

Sir John Trevor knight, master of the rolls.

Sir John Holt knight, chief justice.

Sir John Powell knight,

Sir Littleton Powys knight,

Sir Henry Gould knight,

} justices of the king's bench.

Sir Thomas Trevor knight, chief justice.

Sir John Blencowe knight,

Robert Tracy *esquire*,

Robert Dormer *esquire*,

} justices of the common pleas.

Henry Boyle *esquire*, chancellor.

Sir Edward Ward knight, chief baron.

Sir Thomas Bury knight,

Robert Price *esquire*,

John Smith *esquire*,

} barons of the exchequer.

Sir Richard Simpson knight, *curfitor baron*.

The right honourable John lord Gower, baron of Sittenham, chancellor of the dutchy of Lancaster.

Sir

Sir Thomas Powys knight, } Queen's chief serjeants:
Sir Salathiel Lovell knight, }

Sir Edward Northey knight, attorney general.

Sir Simon Harcourt knight, solicitor general.

Sir John Darnall knight, } Queen's serjeants.
Sir Joseph Jekyll knight, }
Nicholas Hooper esquire, }
Sir Thomas Parker knight, }

John Conyers esquire, } Queen's counsel.
Sir William Whitlock knight, }
—— Aglionby esquire, }
William Jennings esquire, }
Sir James Mountague knight, }

Sir Edward Northey knight, attorney general of the duchy of Lancaster.

Robert Starkie esquire, attorney general of the county palatine of Lancaster.

Mr. serjeant Bennett, judge of the Marshalsea.

Welsh judges.

Sir Joseph Jekyll knight, chief justice, } justices of Chester, &c.
Sir Salathiel Lovell knight, }

Mr. serjeant Hook, } justices of North Wales.
Stephen Harvey, esquire, }

Mr. serjeant Neve, } justices of West Wales.
Mr. serjeant Webb, }

Mr. serjeant Banister, } justices of South Wales.
Charles Cocks esquire, }

Paſch 5 Ann.
B R. Apl. 10,
1706.

Turner *verſ.* Beale.

S. C. Salk. 521. Holt 565. Pleadings poſt vol 3. p. 350.

If an inſolvent
aſt authoriſes
the ſeſſions on
the petition of
any priſoner to
ſummon his
creditors and
diſcharge him,
a plea thereon
muſt ſhew that
the priſoner
petitioned, and
the creditors
were ſummoned.
S. C. Holt 566.

A plea ſetting
forth his diſ-
charge only will
be bad on a ge-
neral demurrer.
S. C. Holt 566.

Notwithſtand-
ing the diſcharge
is ſtated to have
been according
to the form of
the ſtatute.

THE plaintiff brought an action upon the caſe againſt the defendant, upon an *indebitatus aſſumpſit* for 100 l. for goods ſold and delivered by the plaintiff to the defendant, June 1, 1705. upon a *quantum meruit*, and an *inſimul computaſſent*: to the laſt promiſes, and to the whole ſum of 100 l. in the promiſe mentioned beſides 37 l. part thereof, the defendant pleaded *non aſſumpſit*; upon which iſſue was joined. *Et quoad eaſdem triginta et ſeptem libras de dicta ſumma centum librarum in eadem prima promiſſione et aſſumptione mentionatas, idem Abrahamus [viz. the defendant] dicit quod ipſe non poteſt dedicere, quin ipſe ante octavum diem Novembris anno Domini milleſimo ſeptingenteſimo tertio indebitatus fuit prædicto Johanni Turner in eiſdem triginta et ſeptem libris, pro ovibus et agnis [viz. the goods in the declaration] eidem Abrahamo per præſatum Johannem Turner ante tempus illud venditis et deliberatis, ac ante eundem octavum diem Novembris in conſideratione inde ſuper ſe aſſumpſit et promiſit ſolvere dicto Johanni Turner eaſdem triginta et ſeptem libras; et ſic non poteſt dedicere, quin prædictus Johannes Turner damna ſua occaſione non ſolutionis earundem triginta et ſeptem librarum verſus ipſum Abrahamum recuperare debeat: idem tamen Abrahamus petit quod perſona ſua, nec non ejus apparatus, Anglice wearing apparel, toralia, Anglice bedding, ac instrumenta neceſſaria pro ejus occupatione, quæ non excedunt decem libras in valore, ſint ſemper exonerata et libera de et ab omni executione per præſatum Johannem in hac parte habenda, juxta formam (a) ſtatuti in parlamento dominae reginae nunc apud Weſtmonaſterium in comitatu Middleſex, nono die Novembris anno regni ſui ſecundo per prorogationem tento editi, intitulati, An aſt for the diſcharge out of priſon of ſuch inſolvent debtors as ſhall ſerve, or procure a perſon to ſerve, in her majeſty's fleet, or army; quia dicit, quod ipſe idem Abrahamus prædicto octavo die Novembris anno Domini 1703. in eodem ſtatuto mentionato, nec non antea et poſtea, fuit priſonarius aſſualiter in priſona et gaola dominae reginae de mareſcalciae ejusdem dominae reginae coram ipſa regina, ſub cuſtodia Franciſci Southard armigeri cuſtodis priſonae illius, de et ſuper actione ad ſectam Edmundi Warnford pro debito (dicta priſona tunc et adhuc apud Southwark in comitatu Surrey exiſtente) quodque ad generalem quarterialem ſeſſionem pacis dictae dominae reginae tentam apud Guilford, in et pro eodem comitatu Surrey, die Jovis 13 die Julii anno regni dictae dominae reginae nunc tertio, coram Johanne Fulham et Johanne Lade armigeris, et aliis ſociis ſuis juſticiariis ipſius dominae reginae ad pacem in dicto comitatu Surrey*

(a) 2 3 & Ann. c. 16.

conservandam assignatis, ipse dictus Abrahamus prisonarius in forma prædicta tunc etiam existens, per eosdem justiciarios pacis in aperta curia illa, virtute ac juxta formam statuti prædicti de et ab imprisonment suo prædicto debito modo relaxatus et exoneratus fuit; absque hoc, quod idem Abrahamus super seu post prædictum octavum diem Novembris anno Domini 1703, supra dicto assumpsit super se quoad eandem 37 l. modo et forma, prout prædictus Johannes superius inde supponit, et hoc paratus est verificare; unde petit judicium, si prædictus Johannes Turner aliquam executionem in hac parte ad onerandum personam ipsius Abrahami, aut ejus apparatus, toralia vel instrumenta necessaria prædicta habere debeat, &c. Et profert hic in curia idem Abrahamus duplicationem ordinis exonerationis illius, manibus et sigillis dictorum duorum justiciariorum pacis superius nominatorum signatam et sigillatam, quæ præmissa testatur, cujus datus est in dicta generali quarteriali sessione pacis apud Guilford, prædicto 13 die Julii anno tertio supradicto, &c. L. Agar.

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Et prædictus Johannes Turner dicit, quod ipse per aliqua, per prædictum Abrahamum superius placitando allegata, ab executione sua pro damnis suis in hac parte recuperandis occasione non solutionis prædictarum 37 l. versus personam prædicti Abrahami et omnia bona et catalla sua habenda præcludi non debet; quia dicit, quod placitum prædictum per prædictum Abrahamum superius placitatum, materiaque in eodem contenta minus sufficientia in lege existunt, ad ipsum Johannem ab executione sua inde versus personam præfati Abrahami et omnia bona et catalla sua habenda præcludendum, ad quod ipse idem Johannes necesse non habet, nec per legem terræ tenetur aliquo modo respondere: et hoc paratus est verificare. Unde pro defectu sufficientis responsi in hac parte idem Johannes petit judicium, et damna sua occasione præmissorum per executionem versus personam prædicti Abrahami, et omnia bona et catalla sua ad libitum ipsius Johannis fiendam et levandam sibi adjudicari, &c. Demurrer.

T. Pengelly.

Et prædictus Abrahamus dicit, quod placitum prædictum per ipsum Abrahamum modo et forma prædictis superius placitatum, materiaque in eodem contenta bona et sufficientia in lege existunt, ad prædictum Johannem ab executione sua inde versus personam ipsius Abrahami et ejus apparatus toralia ac instrumenta necessaria pro ejus occupatione, quæ non excedunt 10 l. in valore, habenda præcludendum; quod quidem placitum, materiamque in eodem contentam, ipse idem Abrahamus paratus est verificare, et probare curiæ, &c. Et quia prædictus Johannes ad placitum illud non respondet, nec illud hucusque aliquammodo dedicit, ipse idem Abrahamus, ut prius, petit judicium, et quod prædictus Johannes Turner ab omni executione quacunque in hac parte habenda, ad onerandum personam ipsius Abrahami, aut ejus apparatus toralia vel instrumenta prædicta præcludatur, &c. Joinder in demurrer.

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Mr. *Pengelly* for the plaintiff took exceptions to the plea, because the several facts, required by the act of parliament to be done, to intitle the justices of peace to a jurisdiction, were not averred to have been done: without which the justices had no power to make such an order of discharge, as is set forth in the plea; and therefore that the defendant ought expressly and particularly to have shewn, that he petitioned, that the creditor was summoned; that he listed himself a soldier, &c. as the statute has appointed.

Mr. *Eyre* for the defendant insisted upon it, that all those omissions were supplied by the general allegation, that the defendant was discharged *secundum formam statuti*; for if any of those facts were omitted, he could not be said to be discharged according to the form of the statute; and for that purpose he cited *Cro. Jac.* 609. *Johnson's case*, where 'tis said, many of the faults in the indictment were aided by the conclusion, *contra formam statuti in hujusmodi casu editi et provisi*. 2. That if there had been any defect in the proceedings of the justices of peace in this matter, it ought to be shewn by the other side, and should never be intended, as in the case in *Cro. Car.* 280. In a writ upon the statute of *Westm.* 2. 13 *Ed.* 1. *st.* 1. *c.* 46. for throwing down fences in the night, 'tis not necessary to set out that the landlord had a right to improve; but if he has not, it ought to come on the other side. 3. He argued it was good upon a general demurrer, and cited several cases of omissions in pleading, held good after a general demurrer. 1 *Lev.* 194. *Cutler v. Southerne.* 1 *Lut.* 545. 9. *Lee v. Elkin.* He relied also on 1 *Ventr.* 356. *Day v. Copleston*, which though reported short by the book, he took to be much such a plea as this. For there it is said the defendant pleaded the statute for the discharge of poor prisoners, and that he had been discharged by that act. [But see the same case reported, *Sir Thomas Jones* 165. where 'tis said, the defendant set out in good form all matters and circumstances by the act necessary.]

The court were all clear of opinion that the plea was ill, even on a general demurrer; because it did not appear to them, the necessary facts not being averred to intitle the justices of peace to a jurisdiction, that they had any jurisdiction in this case; and judgment was given for the plaintiff. Adjudged accordingly, *Hil.* 5 *Ann.* B. R. *intr.* *Woodrington et Deverill, intr.* *Mich.* 5 *Ann.* B. R. *rot.* 34. *Salk.* 521. *pl.* 25. *Holt.* 567. and that it was naught on a general demurrer, as that case was, and not aided by the statute for the amendment of the law.

Regina *vers.* Baines.Pasch. 5 Ann.
B. R. 1706.

Mandamus and Return post vol. 3. p. 353.

MR. Baines being removed by the justices of peace of the county of *Westmorland*, from the office of clerk of the peace of the said county, obtained a *mandamus* out of the king's bench, to command them to restore him to that office, or to shew cause to the contrary; which writ follows in his *verbis*.

A peremptory *mandamus* for the restoration of an officer shall not be granted, so long as a judgment for his removal given by a jurisdiction able to remove him, remains in force.

A certiorari to remove proceedings against several persons will not remove any proceedings against one of them only.

Vide ante 1199.
so long as a judg-

Anna Dei gratia Angliæ, Scotiæ, Franciæ et Hiberniæ regina, fidei defensor, &c. custodibus pacis nostræ, ac justiciariis nostris ad pacem in et pro comitatu illo conservandam necnon ad diversas felonias, transgressiones, et alia malefacta, in comitatu nostro Westmorland perpetrata audiendum et terminandum assignatis, et eorum cuilibet salutem: Cum Ricardus Baines generosus per præhonorabilem Thomam dominum Wharton nuper custodem rotulorum pacis nostræ in comitatu nostro Westmorland prædicto debite nominatus et appunctuatus fuit clericus pacis comitatus prædicti; qui quidem Thomas dominus Wharton plenam adtunc habuit potestatem et auctoritatem (ut custos rotulorum ejusdem comitatus) ad nominandum et appunctuandum eundem Ricardum Baines clericum pacis ejusdem comitatus, habendum et tenendum officium clerici pacis comitatus prædicti, quamdiu se bene gereret; idemque Ricardus in officium prædictum et exercitium inde debito modo et rite admissus fuit, virtute cujus idem Ricardus ad exercitium officii prædicti, necnon ad proficua inde capienda jure intitulatus fuit et existit; vos tamen justiciarii prædicti eundem Ricardum ab executione officii prædicti minus rite amovistis, et ipsum ad exequendum officium prædictum recusatis, ad grave damnum ipsius Ricardi, sicut ex querela sua accepimus: Nos igitur eidem Ricardus Baines celerem et festinam justitiam in hac parte fieri volentes, ut est justum, vobis mandamus firmiter injungentes, quod immediate post receptionem hujus brevis, eundem Ricardum Baines ad executionem prædicti officii clerici pacis comitatus prædicti restituantis, et ipsum ad exequendum officium illud, et capiendum proficua inde permittatis, vel causam nobis significetis in contrarium, ne in vestris defectibus querela perveniat ad nos iteratim; et qualiter hoc præceptum nostrum fuerit executum constare faciatis nobis apud Westmonasterium die Sabbati proxime post octabis sancti Hilarii, hoc breve nostrum nobis tunc

The sessions may remove the clerk of the peace upon a charge in writing against him for any misdemeanor in the execution of his office; vide 1 W. & M. sess. 1. c. 21. s. 6.

An order of sessions for the removal of a clerk of the peace must shew that a charge was exhibited against him sufficient to warrant his removal. S. C. 6 Mod. 192. Salk. 680. Holt 514.

No charge is sufficient to warrant the removal of a clerk of the peace, which does not accuse him of some misdemeanor in

the execution of his office. S. C. 6 Mod. 192. Holt 514. An order of sessions reciting that by a complaint in writing the clerk of the peace was charged with divers misdemeanors in the execution of his office, to wit, that he exacted from a prisoner eight shillings and six pence for a subpoena to summon four witnesses to give evidence for him at the sessions, which contained only twelve lines, and that he at the general quarter sessions held for the county exacted from a poor labourer, and forced him to pay nine shillings more than his just fees, and also that he had committed divers other exactions and extortions particularly mentioned in the said charge, does not accuse him of any misdemeanors in the execution of his office, because that part of the order which precedes the *videlicet* is not to be considered as a part of the charge. S. C. Salk. 680. Holt 514.

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remittentes, T. J. Holt, milite apud Westmonasterium 24 die
Novembris anno regni nostri primo.

Per regulam curiæ.

To which writ the justices of peace made this following
return :

The return.

A complaint
against Baines,
at the quarter
sessions, 14 July,
1 Ann.

— Nos Christophorus Musgrave miles et baronettus, Christophorus
Phillipson miles, &c. custodes pacis ac justiciarii in brevi huic
schedulæ annexo infrascripti, serenissimæ dominae reginæ nunc
in curia ipsius reginæ coram ipsa regina apud Westmonasterium
humillime certificamus, quod Ricardus Baines in eodem brevi
nominatus, existens clericus pacis pro comitatu Westmorland prae-
dicto, praetextu inde ad generalem quarterialem sessionem pacis
dictae dominae reginæ tentam apud Appleby in et pro comitatu West-
morland praedicto decimo tertio die Aprilis anno regni dictae do-
minæ reginæ primo coram tunc justiciariis dictae dominae regi-
næ ad pacem in et pro comitatu illo conservandam, necnon ad
diversas felonias, transgressiones, et alia malefacta in comitatu
Westmorland praedicto perpetrata audiendum et terminandum
assignatis, durante tota sessione illa, necnon ad generalem quar-
terialem sessionem pacis dictae dominae reginæ tentam apud
Kirkby Kendall in et pro comitatu Westmorland praedicto decimo
quarto die Julii anno primo supradicto, coram Christophoro Mus-
grave milite et baronetto, Ricardo Sandford baronetto, Chris-
tophoro Phillipson milite, Jacobo Grahme, Willielmo Flemming,
Henrico Grahme, Edwardo Willson, sen. Ricardo Brathwaite,
Jacobus Bird, et Thoma Dawes, armigeris, et Johanne Archer
in medicinis doctore, tunc justiciariis dictae dominae reginæ ad
pacem in et pro eodem comitatu conservandam, necnon ad diversas
felonias, transgressiones, et alia malefacta in eodem comitatu per-
petrata audiendum et terminandum assignatis, praedictum officium
clerici pacis pro comitatu illo exercuit et executus fuit; quodque
postea et ante adventum brevis praedicti, scilicet ad praedictum ge-
neralem quarterialem sessionem pacis superius ultimo mentionatam,
quaedam querela et accusatio in scriptis justiciariis pacis in sessione
illa exhibita fuit, querens et accusans dictum Ricardum Baines de
diversis malegesturis in executione praedicti officii clerici pacis pro
eodem comitatu perpetratos, eo quod ad praedictam tunc ultimam
quarterialem sessionem pacis ipse idem Ricardus Baines coegit
quendam Johannem Scott de Woodside labourer ad solvendum
novem solidos legalis monetae Angliæ, ultra feoda sua debita;
ac etiam quod praedictus Ricardus Baines decimo die Aprilis anno
regni dictae dominae reginæ nunc primo supradicto exegit de
quodam prisonario Langborne, et coegit eum solvere et expendere
summam octo solidorum sex denariorum consimilis monetae Angliæ,
pro quo am processu vocato subpoena ad summonendum quatuor testes
ad evidencias dandum ex parte ipsius prisonarii in sessione, qui
quidem processus, vocatus subpoena, continebat duodecim lineas
et non amplius; quodque ad eandem generalem quarterialem
sessionem pacis tentam eodem decimo quarto die Julii anno
primo supradicto, super plenam examinationem et debitam pro-
bationem

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bationem veritatis materiarum eidem Ricardo Baines ut præferatur impositarum aperte in eadem sessione factam et habitam in præsentia prædicti Ricardi Baines (qui existens per ordinem ejusdem sessionis debite summonitus ad respondendum materiis illis ut præfertur ei impositis, ad eandem sessionem in propria persona sua comperuit, et sese per consilium eruditum in lege defendit) prædictus Ricardus Baines inde convictus fuit: ideoque consideratum fuit per curiam generalis quarterialis sessionis illius, quod prædictus Ricardus Baines ab officio clerici pacis prædicti comitatus Westmorland amoveretur et exoneretur, et idem Ricardus Baines superinde ante adventum brevis prædicti in aperta et plena curia sessionis illius per curiam illam ab officio illo amotus et exoneratus fuit: et præfati modo custodes pacis ac iusticiarii in brevi prædicto infra scripti ulterius certificant, quod præfatus Ricardus Baines non fuit nominatus sive appunctuatus esse clericus pacis pro comitatu Westmorland prædicto ad officium illud exequendum, ad aliquod tempus post prædictam amotionem et exonerationem ejusdem Ricardi Baines ab officio suo prædicto; et quod præhonorabilis Thomas comes Thanet, custos rotulorum pacis dominae reginae nunc in et pro comitatu Westmorland prædicto existens debito modo assignatus et constitutus, cui de jure pertinet nominare et appunctuare clericum pacis pro comitatu Westmorland prædicto, post amotionem et exonerationem prædicti Ricardi Baines ab officio clerici pacis pro comitatu Westmorland prædicto, et ante adventum hujus brevis, nominavit et appunctuavit quendam Thomam Carleton generosum fore clericum pacis comitatus prædicti, eodem Thoma Carleton adiuncte existente persona habili et sufficiente residente in dicto comitatu Westmorland, ad exequendum officium prædictum, quamdiu se bene gesserit: et ea de causa nos præfati custodes pacis ac iusticiarii ut præfertur infra scripti præfatum Ricardum Baines ad locum et officium clerici pacis pro comitatu Westmorland prædicto restituere non possumus, prout per breve prædictum nobis præcipitur.

Judgment by
the justices to
remove Baines.

There was likewise a *certiorari* directed to the said justices of peace, to command them to certify all orders against William Atkinson and Richard Baines, made by the said justices, or any of them, which writ of *certiorari* bore teste, June 25 1^o of the queen, and was returnable *a die sancti Michaelis in unum mensem*, upon which the order against Baines only, reported hereafter at large, was returned.

Exception was took to the return of the *mandamus*, that the offence was uncertainly alleged, &c. and therefore a peremptory *mandamus* was prayed; but the court said, the order was a judgment, till set aside, and therefore advised the counsel for Mr. Baines to take exception to the order returned on the *certiorari*, but refused to grant a peremptory *mandamus*. Whereupon the counsel for Mr. Baines took the same exceptions to the order, as are hereafter mentioned at large. And when the court were ready to give their opinion,

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opinion, Mr. attorney general *Northey* took exception to the *certiorari*, that the order was not thereby removed, because the *certiorari* was to remove all orders against *Atkinson* and *Baines*, and the order returned was against *Baines* only, whereupon the *certiorari* was quashed, *Mich. 4 Ann.* after having heard counsel on both sides. [See the report of it before, 1199.] And on a new *certiorari* issued, the order following was returned up, made at the general quarter-sessions of the peace for *Westmorland* held the 14th of *July* the first of this queen.

The order of the
justices.

The misdemean-
ors.

Whereas by a complaint and charge in writing at this sessions, held the said 14th day of *July*, preferred and exhibited to this court, against *Richard Baines* of *Appleby* in this county of *Westmorland* gentleman, clerk of the peace for the said county, who the 10th day of *April* last past, and during the whole last general quarter-sessions of the peace held for this county, did (a) claim and exercise the said office of clerk of the peace for this county, the said *Richard Baines* was charged with divers misdemeanors by him committed in the execution of the said office of clerk of the peace for this county, viz. that he the said *Richard Baines*, the said 10th day of *April* last, did exact from one prisoner *Langborne*, and compel him to pay and expend the sum of eight shillings and six pence, for a *subpoena* to summon four witnesses to give evidence for him in the sessions, which *subpoena* contained but twelve lines; and that the said *Richard Baines* also did at the said general quarter-sessions held for this county exact of one *John Scott* of *Woodside*, a poor labourer, and force him to pay, the sum of nine shillings more than his just fees: and also that the said *Richard Baines* had committed divers other exactions and extortions particularly mentioned in the said charge in writing, and now at this general quarter-sessions, held by adjournment on the said 28th day of *August*, upon due examination in open court of the said matters alleged against the said *Richard Baines*, who by order of this court hath been duly summoned to answer the same, and did attend in person, and had particular notice of each charge against him, and made defence by his counsel thereunto, and upon full proof of the premises made in open court, it doth appear to this court, that the said *Richard Baines* hath misdeigned himself in his said office of clerk of the peace of this county, and in execution thereof, by exacting and extorting by colour of his said office from the said prisoner *Langborne* the said 10th day of *April* last past, the sum of eight shillings and six pence, for the said *subpoena*, to summon the said four witnesses, which

(a) According to 6 Mod. 192. one of the principal objections to the order was that it did not imply that Mr. Baines was clerk of the peace when the supposed offences were committed; the statement being merely that he claimed and exercised the office at that time.

is three shillings and six pence more than the accustomed fee of right due for the same, and by exacting and extorting by colour of his said office at the said last general quarter-sessions from the said *John Scott* nine shillings more than his just fees; and thereupon this court doth openly in court discharge and remove the said *Richard Baines* from the office of clerk of the peace of this county of *Westmorland*, and he is hereby by this court discharged from the same accordingly.

Per curiam Thomas Carleton cleric. pacis.

Divers exceptions were taken by Mr. *Baines's* counsel to this order, which were argued several times, and it was insisted upon by them that this order ought to be quashed. They said, that though before the act of 1 *W. & M. sess. 1. c. 21.* the clerk of the peace was removable by the *custos rotularum*, yet now by virtue of that statute he has a freehold in his office, it being enacted by that statute, that the *custos rotularum* shall appoint the clerk of the peace for so long time as he shall well demean himself in his said office; and that freeholds are so much favoured by the law, that all acts which would avoid an estate of freehold must be taken strictly, and executed precisely, and therefore a man cannot avoid an estate of freehold for a condition broken, without an actual entry. 'Tis true the freehold the clerk of the peace has in his office is by the same act subjected to the jurisdiction of the justices of the peace, so that for a misdemeanor committed by him in his office they may remove him in a summary way; for it is enacted in the same statute, *sect. 6.* that if any clerk of the peace shall misdeemean himself in the execution of his office, and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him to the justices of the peace in their general quarter-sessions, it shall be lawful for the said justices, or the major part of them, from time to time upon examination and due proof thereof openly in their said general quarter-sessions to suspend or discharge him from the said office; and that then the *custos rotularum* shall appoint a new clerk of the peace. But then the justices of peace in case of such removal must pursue the method which that act has prescribed, and if they do not, all their proceedings will be void. And proceedings in cases of this nature, which are to deprive a man of his freehold in a summary way, without letting him be tried by his peers, are always construed strictly, and never supplied by intendment of matter which don't appear on the face of them.

This

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This statute therefore gives the justices of the peace a power to remove the clerk of the peace.

1. For misdemeanors in the execution of his office.

2. This removal must be upon a charge in writing before them of such misdemeanors. And this is but agreeable to common justice, that the party may know his charge, that he might have a fair opportunity to make his defence : but in this case it don't appear, that there was any charge in writing against Mr. Baines for any misdemeanors committed by him in his office.

For the first part of the order is only a recital of a charge, according to the inference or apprehension of the justices, that Mr. Baines misdemeaned himself, and cannot be took to be the charge itself, but only is a narrative, that there was a charge, which as they took it, imported misdemeanors. If it had gone no further, that had been plainly ill, not only because it does not appear there was any charge of misdemeanors, but likewise because it is too uncertain and general, viz. divers misdemeanors, &c. for the misdemeanors ought to be specified, that the court here may judge, whether they were misdemeanors in his office or not.

Then as to the facts after the viz. they are not sufficiently set forth.

For as to the fact in relation to Langborne, that don't appear to relate to Mr. Baines's office of clerk of the peace, as it is set out in the order. For 1. it is not said to be done *colore officii*. In Hutt. 70. Luidley's case, in an information against the under-sheriff of York, for taking 1*l.* 10*s.* for making a warrant on a *capias ad satisfaciendum*, it was held not enough to say, he *colore officii* did it, but it ought to be shewn, to whom the *capias ad satisfaciendum* was directed.

2. It don't appear the 8*s.* and 6*d.* was too much, or more than was his due.

3. It don't appear, the *subpoena* was to summon witnesses to the sessions of the peace of Westmorland, or that Mr. Baines made the *subpoena* as clerk of the peace of Westmorland.

4. 'Tis said Mr. Baines compelled Langborne to pay and expend 8*s.* and 6*d.* but 'tis not said to whom Mr. Langborne

borne paid the 8 s. 6 d. nor that Mr. Baines received it; but it should be so expressly averred, and that Baines extorsive received it.

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Then as to the fact in relation to Scott, it is laid as ill:

1. It is not said, Baines *coloris officii*, or extorsive exacted of Scott, &c.
2. It is not said for what he forced Scott to pay the 9 s.
3. It is not said to whom Scott paid them.
4. It don't appear but that 9 s. were due from Scott more than his fees, and therefore it should have been said, Baines forced Scott to pay 9 s. *pro feodis, et ultra feoda*.

And therefore for these reasons the counsel for Mr. Baines insisted on it, that this order was ill, and ought to be quashed.

E contra it was argued for the queen, that the order was good, and ought to be confirmed, and it was insisted on by the queen's counsel, that this statute of 1 W. & M. sess. 1. c. 21. does not make this office of clerk of the peace a freehold by express words, but only by consequence of law; and though it is a freehold, yet that statute, which has made it so, has subjected it to the justices, and therefore this officer must take his office with the charge.

1. Object. They argued, that there (a) is not the same certainty requisite in an order made by justices of the peace, as in an indictment. In 1 Ventr. 37. The King v. Nelson, a motion was made to quash an order for keeping a bastard child, because it was said to be made *ad sessionem in comitatu prædicto*, and did not say, *tentam pro comitatu prædicto*. Sed non allocatur; for says the book, such strictness is not required in an order.

(a) Vide Dougl.
112. 335. 636.
638. 2 T. R.
471. 472.
3 T. R. 496.

2. Object. That this order was substantially good, though perhaps it might have been expressed more fully; for it does appear upon the whole order, that the statute has been pursued in removing Mr. Baines: it appears, there was a charge against him in writing, that he had notice, and was heard by his counsel, what he had to say; that the facts charged on him were misdemeanors in his office, for the *viz.* incorporates the subsequent particular facts with the general words before, and makes it altogether a good charge for misdemeanors in his office, being explanatory of the general words precedent; and upon this head several cases were cited, to prove that it was the proper office of a *viz.* to explain;

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(a) R. acc. ante
1189. Burr.
1729. D. acc.
Str. 233.

plain; nay, that an (a) averment under a *viz.* is sufficient of itself; and for that 1 *Saund.* 169. *Skinner v. Andrews* was cited, where in debt on an obligation, dated *Feb.* 8. 19 *Car.* 2. the condition was to perform an award to be made on or before the 16th of *March* next following; the defendant pleaded no award made; the plaintiff replied, that the arbitrators after making the bond, and before the exhibiting the bill of the plaintiff, *viz.* the said 16th of *March*, made that award, and then assigns a breach, &c. the defendant demurred; and 'twas adjudged, that this averment, that the award was made on the 16th of *March* under the *viz.* was sufficient. Besides they urged farther, that if the *viz.* was not in this case took to be explanatory, the order would be nonsense, because it began after the *viz.* with the word, That, &c.

West's Prec.
Indictments,
sec. 97. 130.

3. Object. They further said, that an indictment good to a common intent is well, *Co. Lit.* 303. much more in the case of an order; and they cited 1 *Sid.* 91. *The King v. Cover*, as a strong case for them. In an indictment against the bailiff of a hundred for extortion, *scilicet*, that *colore officii* he took 50s. held good after a verdict, though ill on a demurrer. And Sir *Thomas Powys* cited 2 *Brownl.* 151. *Dr. Manning's* case, if particular facts are charged in a bill in the star chamber, and afterwards there are general words, as for extortion, oppression, and other offences; if the particular facts are proved, he may examine to other particular facts included within the general words, and they shall aggravate, and the court will give a higher sentence for them.

4. Object. 'Twas further insisted, that let the rest of the order be as it will, yet the judgment was full, and sufficient; for therein the justices have expressly adjudged *Baines* guilty of misdemeanors in his office; that this clerk of the peace was the justices own officer, and therefore they had a greater power over him, and that the justices being a court of record, great regard was to be had to their proceedings, and 'twas not to be supposed they would act irregularly.

To these objections it was answered by the counsel of Mr. *Baines* particularly.

(b) Vide the
preceding page,
and the books
cited in the
margin.

And as to the first they said, that (b) as much certainty was required in orders as in indictments, as to matters of substance, and so was the constant experience; but the same form was not absolutely necessary, and therefore in convictions for deer-stealing it was not necessary to have *vi et armis, contra pacem, &c.* and so was it adjudged 1. 12 *Will.* 3. *B. R.* the *King v. Chandler* and *Speed.* [ante 545, 581.] and therefore the words reported in 1 *Vent.* 37. that

that such strictness is not necessary in an order, must be understood according to the subject matter of the question, which was about the caption; but that book nor no other says, there need not be the same strictness as to matters of substance. Besides Mr. *Ventris* at that time was a very young reporter, and might mistake, as plainly he did in what he makes the court say, *Ib.* 59. in relation to keeping the bastard child.

As to the second objection, they said, that the charge mentioned in the order is not a good charge, because it don't appear the misdemeanors therein mentioned were misdemeanors in his office; that the *viz.* in this case can't incorporate the subsequent facts with the charge, nor be explanatory, because here the matter alleged before the *viz.* is nothing but a story told by the justices of what their judgment and apprehension was, that this was a charge in writing of misdemeanors of Mr. *Baines* in his office, then comes the *viz.* which is to shew the court, how the charge was of misdemeanors in his office, and is no more than if it had been, *viz.* the charge was that Mr. *Baines* did so and so, which when shewn don't appear to be in execution of his office, and this that comes under the *viz.* is to be took to be the very charge, and what went before only the inference and collection of the justices, and therefore the case out of 1 *Saund.* 169. don't warrant this order; for if the *viz.* must be took as a sufficient averment of itself, as 'tis adjudged in that case, yet here what comes under the *viz.* is not laid to be in execution of his office, and therefore not a good charge. Besides in that case, as reported in 1 *Sid.* 370. 'tis held but form, and that it had been ill on a special demurrer. And 'twas further insisted on, that if the *viz.* was not took to be explanatory, yet the order would not be nonsense, though it began with, That, &c. because that must be took to be the very substance of the charge.

As to the third objection, 'twas answered, that that rule, that an indictment is good to a common intent, must be understood where substance enough appears, but in this case there does not. As to the case in 1 *Sid.* 91. they said, in 1 *Keb.* 357. 'tis reported, that the indictment was, *colore officii et extorsive*, which is stronger. But *Powell* justice held that case not to be law, and as to the case in 2 *Brownl.* 151. 'twas said, it was a star chamber case, but could not hold at common law; for the constant practice was against it, as well as the reason of the thing.

As to the fourth objection, 'twas said, that the judgment did not make the order good, if 'twas otherwise ill, because 'twas a conclusion without premisses, and as for Mr. *Baines* being the officer of the justices, that would make no alteration, he ought to have justice done him, and as to matter

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fer of intendment, the court could not intend one way or other, but must take it as the order was, and therefore the counsel for Mr. *Baines* concluded that the order ought to be quashed.

Afterwards in this case the judges gave their opinions *seriatim*. Mr. justice *Powys* and Mr. justice *Gould* held the order good, for the same reasons used by the counsel for the queen; but chief justice *Holt* and Mr. justice *Powell* held the order ill, for the reasons urged by Mr. *Baines*'s counsel, and were of opinion it should be quashed. Whereupon the court being divided, the justices agreed, the matter should be argued before all the judges of *England* at *Serjeant's Inn*, and that judgment in the king's bench should be given according to the majority of their opinions. Whereupon in *Trinity* term 5. it was argued at *Serjeant's Inn* in *Chancery-lane* by Mr. Attorney *Northey* for the queen, and by Mr. *Raymond* for Mr. *Baines*. And the justices of the king's bench retaining their former opinions, six of the justices of the common pleas, and the barons of the exchequer, viz. chief baron *Ward*, justice *Blencowe*, justice *Tracy*, baron *Bury*, baron *Price*, and justice *Dormer*, were of opinion the order was ill, for the abovesaid reasons, and ought to be quashed; the chief justice and baron *Smith* held the order good. And afterwards in the same *Trinity* term the order was quashed by the court of king's bench.

Smith *vers.* Gould.

S. C. Salk. 666. pl. 2.

Trover does not lie for a negroe. Vide ante 146. 1 Bl. Com. 423. Salk. 666. pl. 1. Hob. 99. 3 Lev. 336. Where several damages are given for several injuries, the judgment may be arrested as to some of them only. Vide ante 891. and the books there cited.

IN an action of trover for a *negro*, and several goods, the defendant let judgment go by default and the writ of inquiry of damages was executed before the lord chief justice *Holt* at *Guildhall* in *London*. Upon which the jury gave several damages, as to the goods, and the *negro*; and a motion as to the *negro* was made in arrest of judgment, that *trover* could not lie for it, because one could not have such a property in another as to maintain this action. Mr. *Salkeld* for the plaintiff argued, that a *negro* was a chattel by the law of the plantations, and therefore *trover* would lie for him; that by the *Levitical* law the master had power to kill his slave, and in *Exodus* xx. ver. 21. it is said, he is but the master's money; that if a lord confines his villain, this court cannot set him at liberty: *Fitz. Villain* 5. and he relied on the case of *Butts* and *Penny*. 2 *Lev.* 201. 3 *Keb.* 785. as in point, where it was held, *trover* would lie for *negroes*. *Sed non allocatur*. For *per totam curiam* this action does not lie for a *negro*, no more than for any other man; for the common law takes no notice of *negroes* being different from other men. By the common law no man can have a property in

in another, but in special cases, as in a villain, but even in him not to kill him: so in captives took in war, but the taker cannot kill them, but may sell them to ransom them: there is no such thing as a slave by the law of England. And if a man's servant is took from him, the master cannot maintain an action for taking him, unless it is laid *per quod servitium amisit*. If A. takes B. a Frenchman captive in war, A. (a) cannot maintain an action, *quare cepit B. captivum suum Gallicum*. And the court denied the opinion in the case of Butts and Penny, and therefore judgment was given for the plaintiff, for all but the negro, and as to the damages for him, *quod querens nil capiat per billam*.

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GOULD.

(a) Vide Reg.
Br. 102. b.
F. N. B. 83. A.

Regina vers. Truebody.

TO a *mandamus* directed to the mayor, &c. of the borough of *Lestwithiel* in Cornwall, to restore Truebody to the office of a capital burghers of that borough, they returned the constitution of the borough, and the election of Truebody, &c. but they shew further, that Truebody left the borough, and lived out of it for several years, and neglected attendance at the publick assemblies, &c. and therefore they removed him from his place of capital burghers. Sir John Hawles for Truebody took an exception to the return, that (a) it did not appear that Truebody had any notice or summons to attend, and shew cause, why he should not be removed; which was contrary to natural justice, that a man should be disfranchised, without ever being heard what he had to say for himself. *Sed non allocatur*; for *per curiam*, if a capital burghers quite leaves the borough, and goes and resides altogether in another place, there is no need of summoning him before he is removed; because he has abdicated the borough, and it is a sufficient ground for turning him out; otherwise if he only left the borough a while for his health's sake, &c. And the return was adjudged a good return.

'Tis a sufficient ground to disfranchise a capital burghers that he has altogether left the borough.
S. C. 11 Mod.
75. Holt 449.
Sed vide Dougl.
569, see also
Rex v. Mayor of London.
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G. 3.

And he may be disfranchised without being summoned to shew cause.
Vide Dougl.
144.

(a) According to the report in 11 Mod. 75. Holt 449. Truebody had been summoned to attend, and did not, but in 11 Mod. Mr. J. Powell is made to doubt whether it was necessary to summon him.

Dunn qui tam, &c. vers. Hinchdy.

Declaration post Vol. 3. p. 356.

Bucks, ff. **G**orgius Dunn qui tam pro domina regina nunc quam pro seipso in hac parte sequitur, queritur de Josepho Hinchdy in custodia marescalli marescalliæ dictæ dominae reginae coram ipsa regina existente, de placito quod reddat dictæ dominae reginae et eidem Georgio, qui tam, &c. viginti quatuor libras, quas dictæ dominae reginae et eidem Georgio, qui

Intr. Hil. 3 Ann.
B. R. Rot. 169.

Under a statute imposing a penalty upon any person who shall make a button of wood only, a wooden button is to be considered as a button

of wood only tho' it has a shank not made of wood. S. C. Salk. 612. R. acc. ante 712. If a statute reciting the inconveniencies which arise from making and wearing particular buttons, imposes a penalty upon any one who shall make, sell or set them on, a person who makes or sells them only is liable to the penalty, tho' he does not set them on.

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tam, &c. debet et injuste detinet; pro eo videlicet, quod prædictus Josephus post decimum diem Februarii anno Domini millesimo sexcentesimo nonagesimo octavo, scilicet sexto die Junii anno regni dictæ dominæ reginæ tunc tertio, infra hoc regnum Angliæ, videlicet apud Stony Stratford in comitatu Bucks prædicto, fieri causavit et vendidit duodecim duodenas, Anglice dozens, fibularum, Anglice buttons, de ligno tantum, et molinitarum, Anglice turned, in imitatione aliarum fibularum, contra formam statuti in hujusmodi casu inde nuper editi et provisi; per quod idem Josephus juxta formam statuti in hujusmodi casu inde editi et provisi forisfecit dictæ dominæ reginæ, et eidem Georgio, qui tam, &c. quadraginta solidos pro qualibet duodena inde, in toto attingentes ad prædictas viginti quatuor libras; et super inde octio accrevit dictæ dominæ reginæ, et eidem Georgio, qui tam, &c. ad exigendum et habendum de prædicto Josepho easdem viginti quatuor libras; prædictus tamen Josephus, licet sæpius requisitus, prædictas viginti quatuor libras, seu aliquem inde denarium, dictæ dominæ reginæ, et eidem Georgio, qui tam, &c. seu eorum alteri nondum solvit, sed illas dictas dominæ reginæ, et eidem Georgio qui tam, &c. solvere omnino contradixit, et adhuc contradicit; unde eidem Georgius, qui tam pro dicta domina regina quam pro seipso in hac parte sequitur, dicit, quod ipse deterioratus est, et damnum habet ad voluntiam triginta librarum, et inde producit sectam, &c. Upon nil debet pleaded, the cause came to be tried before the lord chief baron Ward in Bucks, and the jury found a special verdict, viz. that the defendant, the day and year in the declaration, caused to be made and sold twelve dozens, as is set forth in the declaration; and that those buttons were made of wood only, except the shanks of the said buttons, which were made of brass: and then they found farther, that there are several buttons made of wood only, but whether the buttons so made and sold are, and ought in law to be adjudged, buttons made and sold contrary to the statute, the jury don't know, but pray the advice of the court: if the court should be of opinion that they are; then they find the defendant owes the queen and the plaintiff, qui tam, &c. the said twenty-four pounds, &c. if not then they find the defendant owes not the queen and the plaintiff, qui tam, &c. any thing. This action is grounded on 10 W. 3. c. 2. And it was argued by Mr. serjeant Weld, and Mr. Eyre for the defendant, that this fact found in the special verdict is not within the statute: because, First, they said the shank was part of the button, and therefore, that being made of brass, it was not a button of wood only: Secondly, that the preamble of the statute recited the mischief to be from making and wearing, and the preamble explains the enacting part, so that or should be construed and, the words being, that no person should make, sell, or set on, in the disjunctive; but the construction in order to comply with the preamble, and to prevent the mischief therein recited, must be, that

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that no person should make, sell, and set on, and if so, then the defendant has not incurred the penalty of this statute, because the declaration only charges him, that he caused to be made and sold, but not that he caused to be set on. But the court were clear of opinion in both points for the plaintiff. For as to the shank, it is no essential part of the button, for buttons of silk and hair are made without shanks, and so was it adjudged. *Hil. 13 W. 3. B. R. The King v. Roberts, [ante 712.]* As to the second, the words are plain in the disjunctive, and either making, selling, or setting on such buttons, are offences within this statute; and the parliament could never mean them in the copulative, because they who make and sell the buttons, very rarely, or never, are the persons that set them on, or cause them to be set on the cloaths. And judgment was given for the plaintiff, *April 26, 1705. Pasch. 6 Annæ, Mr. serjeant Chesbrey and Mr. Raymond for the plaintiff.*

Michaelmas Term

5 Annæ reginæ, B. R. 1706.

THE judges all met at *Serjeant's Inn* in *Chancery-Lane* this term, to consider of the act of parliament of last sessions, 4 Ann. c. 17. intituled, An act to prevent frauds frequently committed by bankrupts; and upon consideration thereof, they all unanimously came to these resolutions following :

1. That the commissioners of bankrupts have no authority to proceed upon that statute, unless the person did become a bankrupt after the 24th day of *June* 1706, although such person had committed an act of bankruptcy before the 24th of *June*, if no commission was sued out thereupon before the 10th of *March* before.
2. That the commissioners ought to certify, that such person became a bankrupt after the said 24th day of *June*.
3. That upon references of commissioners certificates upon that statute to the judges, they will examine into, and take notice of the time of the act of bankruptcy committed, if complaint is made thereof by the bankrupt's creditors, otherwise not.
4. That if the commissioners certify a fact that is false, the whole certificate will be void.
5. That upon references of the certificates of the commissioners to the judges, witnesses shall be examined upon oath, to satisfy the judges as to the facts, or else copies may be produced of *affidavits* took before masters in chancery, ordinary or extraordinary, and filed in chancery.

6. That

6. That the allowance or disallowance of the certificate by the judges ought to be filed, as is the allowance by the lord keeper.

7. In case the commission of bankrupts fell by the death of the commissioners, and was renewed and pursued without intermission or loss of time, the second commission shall be as the first was, and the bankrupt shall have the same benefit by it.

8. In case a commission is superseded, yet it may be renewed by *procedendo*, without any damage to the bankrupt.

Hilary Term

5 Annæ reginæ, B. R. 1706.

Colebeck *vers.* Peck.

Intr. Mich. 5

Ann. B. R.

Rot. 187.

If the defendant dies after a verdict against him and before the day in bank, the plaintiff may enter up judgment in the cause as if he were alive. vide 1 Lev. 277. 3 Keb. 549.

And a scire facias thereon against his personal representative may recite the judgment as if it had been entered in his life-time.

THE plaintiff sued a *scire facias* against the defendant, as executor to J. S. on a judgment obtained by him against the testator: the defendant pleaded in abatement, that the testator died before judgment, &c. The plaintiff replied and set out the statute of 17 Car. 2. c. 8. and that the testator died after a verdict obtained against him, and after the day of *nisi prius*, and before the day in bank. The defendant demurred, and Mr. Whitaker insisted that the plaintiff ought to have sued a special *scire facias*, and not a general one: for now the writ supposes a judgment against the testator in his life-time, and the replication shews it was entered after his death, though well entered by virtue of the said statute. But *per curiam*, the writ is good, and could not be otherwise; for had it been special, there would have been a variance, the judgment being entered generally; and a *respondeat ulterius* was awarded. Vide *Raymond*, 210. 1 Mod. 6. *Burnett v. Holden*.

The Queen *vers.* The Inhabitants of Barking, of the hamlets of Donnesden and Needham in the said parish.

A farmer is not taxable to the poor's rate for his stock. vide 16 Vin. 426. pl. 67.

A tradesman is. R. acc. Cowp. 613. quod vide. acc. 16 Vin. 426. pl. 8.

Semb. cont. Burr' 2290. Cowp. 326. vide Cowp. 559.

UPON quashing of several orders made relating to the poor's rates, the matter in difference was referred by the king's bench to the determination of the lord chief justice Holt, who having heard all the parties, and they not seeming satisfied with his opinion, they signified their consent in writing to submit this question to the opinion of the judges of the king's bench, viz. whether a farmer for his stock shall not be chargeable and taxable

to the poor's rates, as well as a tradesman for his stock in trade. And November 22 last past, *Powell, Powys*, and *Gould* justices, were of opinion, that a farmer for his stock was not taxable, contrary to the opinion of *Holt* chief justice. Whereupon the following rule of court was made this term, viz. *Suff. ff. Regina vers. inhabitantes parochiae de Barkin, et hamlet. de Needham, et hamlet. de Donnesdon, in parochia prædicta. Super matura deliberatione per curiam hic habita, consideratum est per curiam hic, quod firmarius, Anglice a farmer, non erit onerabilis et taxabilis ad ratas pauperum pro pecuniis, Anglice stock: et quod artifex, Anglice a tradesman, est onerabilis et taxabilis pro pecuniis, Anglice stock; in arte, Anglice trade.*

Easter Term

6 Annæ reginæ, B. R. 1707.

Powell *vers.* Beresford.

S. C. 2 Eq. Abr. Wilf. A. pl. 5. 2d ed. p. 761.

If a man writes a paper importing to be his last will and testament made for fear of mortality, till he should be able to settle it more at large, and delivers it to the only legatee mentioned therein, and afterwards declares that he has given such legatee a security for the sum, which proves to be the amount of the legacy; assigning as the cause that he did it for fear of mortality till he could make a compleat will, which he meant to do when his wife should be brought to bed, and dies while his wife is lying in without making any other will, such paper shall be considered as his will. Vide 2 Vern. 647.

ON an appeal to delegates from a sentence of the prerogative court, the case was this. *John Beresford* having had a long acquaintance with *Mrs. Powell*, afterwards married the respondent; but having 500*l.* of *Mrs. Powell's* in his hands, on the 7th of *December 1704*, made a will or testamentary schedule, all of his own handwriting as follows: In the name of God, Amen. I *John Beresford* of the *Inner Temple*, esq; do make this my last will and testament for fear of mortality, till I can settle it more at large: I do give and bequeath the sum of 1000*l.* unto *Dorothy Powell*, to be paid by my executor, administrator, and for sure payment thereof I do charge all the real and personal estate which I have in the world, I being very desirous to make a provision for the said *D. Powell*, for several good reasons inducing me thereunto. In witness whereof I have hereto set my hand this present 7th day of *December 1704*. Signed *John Beresford*; and delivered the same to the said *Dorothy Powell*. And about a fortnight before his death, which happened in *January 1704*. Mr. *Beresford* did declare he had left with *Mrs. Powell* an unquestionable security for 1000*l.* charged upon his real and personal estate; and that he had done the same for fear of mortality, till such time as he could make a full and compleat will, which he declared he would do, so soon as his wife was brought to bed, to see if it were male or female. He died suddenly 6 *February 1704*, leaving his wife the appellant, then lying in of a daughter. The widow afterwards came to take administration to her husband, and a *caveat* being entred by *Mrs. Powell*, she appeared, and pleaded this will or schedule testamentary, and proved by four witnesses what is alleged before. She was also examined on interrogatories on the prayer of the respondent, on which she deposed, that she was married to Mr. *Beresford* 18 *July 1700*, at his chambers in the *Inner Temple*, by *Robert Harfnet* clerk, since deceased. [But the marriage was not insisted on, *Harfnet* being dead.]

His

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His hand was proved by three witnesses, who swore they knew his hand, and believed it to be all his hand. A deed was proved to be executed by him, to which his name was subscribed, by witnesses that saw him subscribe his name thereto. And four senior proctors were sworn to examine and compare the letters and characters, *Jo. Beresford*, wrote to such deed, and the characters and letters, *John Beresford*, subscribed to the will, and to report their judgment to the court upon their oaths, who returned they found they were one and the same hand-writing of *John Beresford* the testator.

The cause coming to be heard before the judge of the prerogative, Sir *Richard Raines*, he gave sentence against the will, and pronounced, that *John Beresford* died intestate without any will at all by him made. And on this appeal being heard before the delegates, among whom were lord chief justice *Holt*, baron *Price*, and judge *Darmer*, the sentence was reversed, and they pronounced for the will. *R. Raymond* counsel for the appellant.

Regina *vers.* Ipswich corporation.

S. C. Salk. 448.

A Peremptory *mandamus* being granted by the king's bench, to restore serjeant *Whitacre* to the office of recorder of *Ipswich*, Hil. 4 *Annæ*, returnable the first day of this term; the corporation returned, that they had restored him according to the command of the writ. And on motion to file the return, it was opposed, on suggestion that the writ was not effectually obeyed; for at the same time they restored him, they made an order to summon him, to shew cause why he should not be again discharged, which summons was served on him. And on the 15th of *May* 1707. on hearing counsel of both sides, the fact appeared to be, that a great court, which is an assembly of the whole corporation, was called 22 *April* 1707. where it was ordered he should be restored, and he was restored. And they made another order after at the same court, that he should be served with a summons, to shew cause on the 7th of *May*, why he should not be displaced for misdemeanors committed by him, specifying what, part of which or most were the same as in the former return. The 7th of *May* he sent an answer in writing to the misdemeanors charged on him, which was voted insufficient, and they displaced him again. And the return to the peremptory *mandamus* was allowed to be filed, and held, the writ was well obeyed. *R. Raymond* counsel for Mr. *Thompson*, who opposed serjeant *Whitaker*.

Regina *vers.* Tanner et alios.

On an information for a riot, an infant defendant may appear by attorney.

IN an information for a riot, the defendant pleaded not guilty, and the cause being carried down to *Hertford* assizes in *Lent* 1606-7. verdict for the queen. And motion was made to set aside the verdict, First, because the defendant gave no authority to the attorney to appear before him. Secondly, because he was an infant under eighteen, and ought to have appeared by guardian; and on reference to the master, it appeared there was an authority to plead; and as to the second, the course of the crown office is for infants in riots, &c. to appear by attorney. And so it was ruled, and the court refused to set aside the verdict. *R. Raymond* for the queen.

Intr. Mich.
5 Annæ. B. R.
Rot. 227, 228.

No objection can be taken in a cause in which the defendant was an infant on account of the entry of an amercement upon him in the judgment if there was a verdict in the cause.

Wilkinson *vers.* Tireman.

ERROR of a judgment given in the common pleas in dower [Intr. Hil. 4 Annæ C. B. Rot. 529.] brought by *Elizabeth Tireman* against *John Wilkinson* an infant, who appeared by his guardian. The tenant pleaded, *Ne unques seise que dower*. On issue joined a verdict at *York* assizes was given for the demandant; that the husband was seised, &c. and further, that he died the 14 July 1703. seised in fee, and that the tenements were worth 40*l.* 15*s.* per annum ultra *repisas*, and they assess damages beyond the said value, and besides costs 2*d.* and for costs 40*s.* And judgment was given for the demandant, to recover her seisin of the third part of the tenements, &c. to hold in severalty by metes and bounds, and the value of the third part from the time of her husband's death, which value amounted to 38*l.* 6*s.* and the damages given by the jury 40*s.* and 2*d.* and 21*l.* 8*s.* 10*d.* costs *de incremento*, which value and damages attained in tota to 61*l.* 15*s.* Et *praedictus Johannes Wilkinson* in *misericordia*, &c. The defendant by his guardian, being then an infant, assigned the general error. And the error insisted on was in the judgment, that it appeared the defendant was an infant, and yet was amerced. But judgment was affirmed Tuesday, May 20. 1707. the court being all of opinion, that this was aided by the statute of 16 & 17 Car. 2. c. 8. *R. Raymond* counsel for the demandant in the king's bench. *Vide Cro. Car.* 410. 1 *Roll.* 758. pl. 4. *Smith v. Smith.* Co. Lit. 127. a. 5 Co. 49. *Moor* 394. pl. 511. *Vaughan's case.*

Degrave *vers.* Hedges.

UPON hearing counsel, who came to shew cause according to a former rule made in *Hilary* term last, why a prohibition should not be granted to stay a suit in the court of admiralty, upon a stipulation entered into there by the plaintiff: the case appeared to be, that there were eight owners of the ship called the *Upton Galley*, six of whom were desirous that the ship, then lying in the river of *Thames*, should be sent on a voyage to, &c. the other two opposed it; thereupon the six libelled in the admiralty against the others in order to obtain a decree of that court, that the ship should make her voyage accordingly; which was decreed accordingly; and that the six should enter into a stipulation to the other two, for the safe return of the ship. The stipulation was entered into, and the ship sailed, and was lost on the voyage; the two, *viz.* *Grames* and *Rigby*, sued the other six, *viz.* *Degrave*, and five others, on this stipulation in the admiralty. *Degrave* moved for a prohibition to stay this suit, upon suggestion of the statute of 13 R. 2. c. 5. and 15 R. 2. c. 3. and of the facts before alleged.

If one of several part owners of a ship object to a voyage he can compel them to enter into a stipulation in the court of admiralty for her safe return. R. acc. ante 223. and see the books there cited.
If he can, &c. Whether he can maintain a suit in the admiralty upon such stipulation. R. acc. ante 223. and see the books there cited.

Dr. *Lane* against the prohibition insisted upon it, that this was a matter of the utmost consequence to the admiralty; that as the admiralty had exercised a jurisdiction in such cases for five hundred years past, so if a prohibition should go, that court would signify nothing, because most of their proceedings are by taking such stipulations; that the same objections as are used in this case, would hold in the cases of privateers, who all enter into an obligation, not to molest the king's subjects, nor to correspond with his enemies, &c. and their ships commonly before they grant them their commission lie in the *Thames*, and yet proceedings on such securities have always been in the admiralty: and never doubted but they were good; and *argumentum, quod nimium probat, nihil probat*. That at common law there could be no remedy on this recognisance or stipulation; that the intent of the statutes of *Rich. 2.* are to restrain contracts of which the common law has a jurisdiction, which appears by the preamble, *viz.* that the admiralty had incroached upon the jurisdiction of the common law. *Selden* in his *Mare Clausum*, c. 24. says that *Edward III.* settled the admiralty, and restored and reduced it, and re-established the laws of *Oleron*, which were the *Rhodian* laws, by which the *Romans* governed themselves as to maritime affairs. And that by the law of *Oleron* such proceedings, as in the present case, in the admiralty are allowed. *Serjeant Parker* was counsel for the plaintiff; but the court being

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being of opinion, that this point was not fit to be determined on a motion, stopped him, and (a) ordered the plaintiff to take a prohibition, and declare upon it, and then on the defendant's demurrer the point would come judicially before them, and would receive a more solemn determination. But *Holt* chief justice said, that the court of admiralty might take stipulations for bail, and that they might proceed upon them, and it was constantly allowed, though *Co. 4 Inst.* 135. is of another opinion, and yet such stipulations are as much within the words of the statute of *Rich. 2.* as the recognisance in this case. But the question in this case is, if by the custom of *England* the admiralty has not such a jurisdiction; if it has, neither the statute, nor common law, will restrain them.

(a) It does not appear that this case ever came again before the court: and in *1 Barnard. 415.* Lord Raymond is made to say, that he believed the parties who moved for the prohibition seeing the opinion of the court, did not proceed in it.

Trinity Term

6 Annæ Reginae, B. R. 1705.

May *vers.* Hodge.

S. C. 11 Mod. 117.

A Rule to shew cause, why a prohibition should not be granted, to stay a suit commenced by *Dionysia Hodge*, the wife of *William Hodge*, and *John Hodge* her son, before the archdeacon of *Cornwall* against the plaintiff *May*, for saying to *John Hodge* these words, viz. "Thou art a bastard and a pepper queen bastard." And on the motion of *Mr. Raymond* this term, the rule was discharged. For as to the son, no action at law lies for calling him a bastard, without special damage; and they are not bare words of heat; and by the ecclesiastical law a bastard cannot be a priest, 3 *Lev.* 119. *Vincent v. Alpy*, 2 *Roll. Ab.* 295. pl. 2. *Linw.* p. 26. 2. As to the mother, it is calling her whore, *Cro. Car.* 399. 2 *Roll. Ab.* 296. pl. 18. *Hil. 6 Will.* 3. B. R. 1694. *Morrel et uxor v. Kendall*. The plaintiff libelled against the defendant for calling the husband cuckold, and prohibition was denied: though *Holt* held then the best way was, for the wife to libel alone, but in such case if the husband libelled alone, a prohibition should be granted. 1 *Sid.* 248. *Knite v. Jacob*.

No action lies generally speaking for calling a man a bastard. Vide ante 379. Com. Action upon the case for detraction. D. 11. 2d. Ed. Vol. 1. p. 180.

Or for charging a woman with whoredom. R. acc. ante. and see the cases there cited.

But a suit may be instituted in the spiritual court for the first of these causes, or the second. R. acc. ante. 508. 637. 1107. 1116. Str. 823. Vide Com. Prohibition O. 14. 2d. Ed. Vol. 4. p. 507.

Trinity Term

8 Annae Reginae, B. R. 1709.

Smith *vers.* Bowen.

If an appeal is removed by *certiorari* the appellee must be arraigned on the appeal returned. Therefore if the appeal was brought by an infant in person, the court cannot before the arraignment admit him to prosecute it by guardian. S. C. 11 Mod. 216.

An infant cannot prosecute an appeal in person. S. C. 11 Mod. 216.

But he may by guardian. S. C. 11 Mod. 216.

If an appellant appears on inspection to be an infant, and the appeal was brought by him in proper person, the court will abate it *ex officio*. S. C. 11 Mod. 216.

And if the appellee is in the custody of the marshall, a bill of appeal may be immediately filed against him. S. C. 11 Mod. 216.

BOWEN was indicted, tried, and convicted at the *Old Bailey* of the murder of *William Smith*; but there being some reason to apprehend *Bowen* might obtain her majesty's pardon, an appeal was at the same sessions of gaol-delivery brought against *Bowen* by *George Smith*, brother and heir to the said *William Smith*, in proper person, and was then and there arraigned. After the arraignment whereof it appearing, that *George Smith* was but six or seven years old, he was admitted to prosecute by guardian. *Bowen* prayed time to plead to this appeal till next sessions, which was granted. After which he did procure her majesty's pardon, and obtained a *certiorari* returnable the first day of *Easter* term last, to remove the appeal into the king's bench; at which day *Bowen* was brought up by a *habeas corpus* directed to the keeper of *Newgate*, and the appeal was returned upon the *certiorari*; *Bowen* was committed *custodias mareschalli*. And Mr. serjeant *Parker* and Mr. *Whitaker*, counsel for the appellant, perceiving the mistake committed at the *Old Bailey*, moved, that the appellant might be admitted to prosecute by guardian before the appeal was arraigned; and thereupon the court were of opinion, that *Bowen* must be arraigned upon the appeal returned on the *certiorari*, which was done accordingly. Upon which at the prayer of the counsel for *Bowen*, viz. Mr. Solicitor General *Eyre*, Mr. *Raymond*, and Mr. *Pengelly*, time was given to *Bowen* to plead till *diem Martis proxime post mensem Paschae*, being May 24, 1709, at which day by advice of his counsel *Bowen* declared he would plead not guilty, the counsel knowing, that if they had pleaded in abatement the prosecution of the appeal in proper person by the appellee, whereas he being an infant it ought to be by *prochein amy* or guardian, the appellant would have confessed it, and to the appeal would have been abated, and then they would have arraigned him in *custodia mareschalli*, &c. upon a

DEW

New appeal; and by that means this mistake would have been of no service to the appellee. Whereas the counsel thought, by pleading not guilty to have tried the merits; and if the defendant had been found guilty, and judgment had been given against him, upon a writ of error to have assigned this for error in fact, and so reversed the judgment: before which time the year and day would be elapsed, and by that means *Bowen* freed from the danger of a new appeal. But the court perceiving the intent of the appellee's counsel, declared, that by inspection of the appellant they saw he was an infant, and therefore the appeal being brought by him in proper person was erroneous; and that therefore they would abate the appeal *ex officio*, and give the appellant leave to file a new bill of appeal by guardian, whereon *Bowen* should be arraigned *instantly*, which was done accordingly: and thereupon this following entry, perused and approved by the lord chief justice *Holt*, was drawn up, and entered on the roll of the first appeal, as of the first day of the term.

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v.
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Vide 41 Aff. p. 14 Bro. Appeal 75. an infant within age of 13 sued an appeal, and for his non-age the appeal was abated, and the infant amerced.

(a) *Et modo ad hunc diem, scilicet diem Mercurii proximo post quindenam Paschæ, isto eodem termino, coram domina regina apud Westmonasterium venit Johannes Bowen in custodia vicecomitis Middlesex in curiam hic ductus virtute brevis dictæ dominæ reginæ de habendo corpus eidem vicecomiti Middlesex directi, et instantè committitur custodiæ marescalli marescalliæ dictæ dominæ reginæ ibidem remansurus quousque, &c. Et prædictus Georgius Smith frater et hæres prædicti Willielmi Smith similiter venit hic in curia in propria persona sua, et superinde, quia per inspectionem corporis dicti Georgii Smith per curiam dictæ dominæ reginæ hic manifestè apparet eidem curiæ dictæ reginæ hic, quod prædictus Georgius Smith, tempore exhibitionis prædictæ billæ appellæ versus prædictum Johannem Bowen, ut præfertur, fuit, et modo est, infra ætatem viginti et unius annorum, et quia prædictus Georgius Smith (sic infra ætatem viginti et unius annorum existens) prosecutus fuit prædictam billam appellæ in propria persona sua, et non per guardianum vel custodem, seu proximum amicum suum, versus prædictum Johannem Bowen; ideo consideratum est per curiam dictæ dominæ reginæ nunc hic, quod prædicta billa appellæ per prædictum Georgium Smith, sic ut præfertur in propria persona sua exhibitæ cassetur, &c. et quod prædictus Georgius Smith nil capiat per billam suam prædictam et quod prædictus Johannes Bowen eat inde sine die, &c.*

(a) See a translation of this entry post vol. 3. p. 357.

Note, that several of the year books say, that if by inspection it appears to the court the appellant is an infant, the parol shall demur to his full age. 13 Aff. p. 11. Br. Appeal 53. Mich. 22 Edw. 3. Corone 30. Br. Appeal 116. 45 Ed. 3. 25. Pasch. 17 Edw. 4. Br. Appeal 105. 11 Hen. 4. 14. Br. Appeal 36. But 27 Hen. 8. 11. Br. Appeal

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Appeal 2. and Covertur & enfant 2. is, that in the king's bench an infant brought an appeal of murder, and it was demanded of the justices how he should appear, by guardian or *prochein amy*? *Fitz James* said, by guardian; and the clerks said, the precedents were so. *Portman* justice, one book, *viz. Br. parol. demur. 1.* is, that the appeal shall stay till his full age. But that is not law at this day, for the common practice is to the contrary. *Quod nota* says the book, that an infant shall be answered in an appeal brought by him, when he is within age, and it shall not stay till his full age. 1 *Ro. Abr.* 288. *D. Tr.* 43 *Eliz. Slanning v. Pits*: an appeal sued by an infant by guardian. And 2 *Ro. Rep.* 57. *Onslow's case.* And———*Will.* 3. *B. R.* *Mr. Spencer Cowper's case.*

Then the counsel for *Bowen* insisted upon it, that he could not be arraigned upon a new bill of appeal, as in *custodia mareschalli, &c.* and for that they relied on *Cro. Eliz.* 605. and 1 *Ro.* 581. *Holland's case*, where a man brought an appeal by original writ against four of *Sir George Farmer's* servants, and at the return of the writ they appeared at the bar, and then he would have declared against them, being at the bar, as in *custodia mareschalli, &c.* (there being a fault in the writ,) and by the rule of the court he could not. For the appearance of the defendants does not make them in *custodia mareschalli, &c.* unless there be a record made, *quod committitur mareschallo, &c.* or that they find bail: and there the appellant was called on the writ, and nonsuited, and the defendants discharged.

But the court said, the reason of that was, because the defendants were not committed *custodiae mareschalli*; but *Bowen* was, in this case, and therefore a bill might be filed against him as in *custodia mareschalli*. And the lord chief justice *Holt* relied on the case of *Watts and Brains, Cro. Eliz.* 694, 778. as in point: where in an appeal of murder directed to the warden of the *cinque ports*, the writ was returned in the king's bench, and filed, and the defendant brought to the bar, and because the proceedings were void, because the writ should have been directed to the Sheriff of *Kent*, the appellee was committed to the *Marshalsea*, and a bill was filed against him of appeal for the murder, as in *custodia mareschalli*, and afterwards he was executed thereupon.

The court being unanimous of this opinion, a new appeal was filed against *Bowen*, as in *custodia mareschalli, &c.* and he arraigned immediately upon it, which follows in *hæc verba*.

Smith *vers.* Bowen.Intr. Pasch. 3
Annæ, B. R.
Rot. 304.

Middlesex, ff. **M**emorandum quod die Martis proxime post
mensẽ Paschæ, isto eodem termino, co-
ram domina regina apud Westmonasterium, venit Georgius Smith
de East Smithfield, in parochia sancti Botolphi extra Aldgate in
comitatu Middlesex frater et hæres Willielmi Smith, fratris sui
nuper defuncti; qui infra ætatem viginti et unius annorum
existit, per Thomam Smith patrem et guardianum suum per cu-
riam dominae reginae hic specialiter admissum, et protulit hic in
curia dictae dominae reginae tunc ibidem, quandam billam suam
versus Johannem Bowen in custodia marescalli, &c. de morte
praedicti Willielmi Smith quondam fratris praedicti Georgii,
unde eum appellat, et sunt plegii de proseguendo, scilicet, Isaacus
Miller de parochia sancti Andreae Holborn in comitatu Middlesex
faber ferrarius, et Johannes Pickering de parochia sancti Botol-
phi extra Aldgate in comitatu praedicto flannarius. Quae qui-
dem billa sequitur in haec verba, scilicet, Middlesex, ff. Geor-
gius, &c.

Michaelmas Term,

8 Annæ Reginae, B. R. 1709.

Burridge *vers.* the Earl of Suffex, and others.

Wednesday October 26.

Lands in Kent
are *prima facie*
to be presumed
Gavelkind.

An inquisition
post mortem is
good evidence
of any deed it
finds in *hæc*
verba.

THE plaintiff brought an ejectment for lands in *Cheveley, &c.* in *Kent*, upon the demise of Mrs. *Leonard*, third daughter of *Henry Leonard*, late brother of the earl of *Suffex*. On not guilty pleaded, the cause this day came to be tried at the queen's bench bar. And the lessors, &c. made a title to a moiety of the lands in question (as the plaintiff had declared) as heirs of the body of *Richard lord Dacre*, under a settlement made by him in king *James* the First's time, the lands being of the nature of *Gavelkind*; to the other moiety whereof the earl of *Suffex* was admitted by the plaintiff to be intitled. For *Richard lord Dacre*, who made the settlement, had issue *Francis lord Dacre*, and *Francis lord Dacre* had issue the present earl of *Suffex*, *Francis*, and *Henry* the father of the lessors, &c. And *Francis* the brother of *Henry* was dead without issue. And first it was resolved by the whole court, that the lands lying in *Kent* should be presumed *prima facie* to be of the nature of *Gavelkind* without farther proof, that being the general tenure of that county, and that the proof must lie upon the other side to prove them disgavelled. Then the counsel produced an inquisition taken *post mortem* of *Richard lord Dacre*, 5 Car. 1. wherein the deed was found in *hæc verba*, whereby the general tail was created, under which the lessors of the plaintiff claimed. And it was a deed, whereby *Richard lord Dacre* covenanted to stand seised to the use of himself for life, and afterwards to the use of such wife as he should marry, and after to *Francis* his eldest son and heir apparent (who was afterwards *Francis lord Dacre*, grandfather of the lessors, &c.) and the heirs of his body. *Richard lord Dacre* did afterwards marry *Dorothy*, to whom an estate for life by a subsequent deed was limited, and she enjoyed it during her life. The original inquisition itself with the writ annexed

to it was produced, being brought from the *Roll's chapel*. And it was objected by Sir *Edward Northey* for the defendant, that it was not sufficient evidence to prove the deed. But it was resolved by the whole court, that it was good evidence, and did prove the deed and intail, and consequently a title in the lessors of the plaintiff, taking the lands not to be disgavelled. But then the defendants gave evidence, that the lands were disgavelled, very clear evidence as to all but one farm of 30*l. per annum*, and as to that, though their evidence was defective, yet being left to the jury, they gave a verdict for the whole for the defendants. *Raymond* one of the counsel for the plaintiff.

BURBIDGE
v.
Lord SUSSEX.

Booth *vers.* the Marquis of Lindsey and others.

Monday, October 31, 1709.

THE plaintiff brought an ejectment for lands in *Lincashire*, on the demise of the countess dowager of *Lindsey*. On not guilty pleaded, the lessor made title under a judgment in a writ of dower, brought by her for a third part of the manor of *Grimesthorpe*, *Southorpe*, and *Edenham*, in which she had judgment to recover the said third part of the said manors; and thereupon a writ of seisin issued, whereupon the sheriff returned, that he had given her seisin of the lands in question, as the third of the said manors. Sir *Thomas Powys* and the other counsel insisted, that the plaintiff ought to prove the lands in the return part of the said manors; but by the court, that shall be presumed, unless the defendant prove the contrary, because they will not intend the sheriff has done wrong. And for the same reason they will intend the sheriff has given seisin but of a third. Then the counsel for the defendants offered to give in evidence an old term for five hundred years, created by *Robert Earl of Lindsey*, by his marriage settlement made on the marriage with his first lady (the lessor being his third wife) which was still subsisting, and was now in the executors of the late lord chief baron *Mountague*, who was surviving trustee, the term being in trust for raising portions for daughters of that marriage, which trust was not yet performed, 6000*l.* being yet due to the countess of *Rivers*, who was daughter of that marriage. And they insisted, that it was enough in all ejectments for the defendants to shew the title out of the plaintiff, and therefore they said, it was every day's practice to give in evidence a prior mortgage made to a stranger, whereby the defendant in ejectment defended his possession; for ejectment being a possessory action, the defendant's possession was *prima facie* a title for

Under a writ for the delivery of seisin of the third part of certain manors, the lands which the sheriff says in his return he has delivered, shall *prima facie* be taken to be part of those manors.

And to contain a third part only.

But if any of the lands mentioned in the return are not part of the manors, the execution as to them is void, and cannot be set up against an ejectment for them. If an ejectment is brought under a recovery in

dower, the recovery will stop the tenant and all who claim under him from insisting upon a prior outstanding term. *Vide Com. 581.*

BOOTH
v.
LINDSEY.

(a) R. acc. BWR.
2484.

him, if the plaintiff could not shew a better, for (a) he must recover upon his own strength, and not upon the defendant's weakness. And this was debated by the counsel on both sides, and strongly urged by the counsel of the defendant. Whereupon the court unanimously resolved, that unless the defendants would derive a title under that term, or shew they had a title prior to the recovery (which they could not do) they were estopped by the recovery to give this term in evidence. For first, as to the marquis of *Lindsey*, who was tenant in the writ of dower, they held, that if he would have took advantage of this term, he should have pleaded it in the common pleas to the writ of dower, not in bar of the action, for it is no bar in dower, but in delay of the execution; which he not doing, but pleading *ne unques seisse que dower*, &c. he cannot now give it in evidence, for that would be in effect to falsify the recovery; for the lady has recovered her dower as in possession, whereas had this term been pleaded, she could have recovered it but in reversion; so that the marquis is estopped to give it in evidence by the judgment. Then the other defendants, being all his tenants, are estopped likewise claiming under him. But if they could shew any leases prior to the recovery, then the court would give them leave so far to falsify the recovery; but being only tenants to the marquis, they were estopped as well as he. And *Holt* chief justice said, that the defendants were not within the statute, which gives termors liberty to falsify recoveries. At common law no termor could falsify a recovery in a real action; then the statute of *Glouc. 6 Ed. 1. c. 11.* gave termors remedy where judgments were let go by default; then the statute of *21 H. 8. c. 15.* gave termors leave to falsify recoveries in any real action in all cases, but then such person must shew himself to be a termor, or derive a title under the term; but the tenant of the land being a mere stranger to the term, is not within the benefit of that statute, so as to give a term of a third person in evidence to falsify the recovery against himself, or those under whom he claims, which is the present case. To which the other judges agreed, and refused the counsel of the defendant, though very importunate, to admit them to give evidence of that term of five hundred years; but offered to sign a bill of exceptions, which the counsel declining to offer, attempted to falsify the sheriff's return of the writ of seisin, by proving, that the lands in the return, or at least a great part of them, were not parcel of any of the three manors. Upon which *Sir Simon Harcourt* and serjeant *Pratt* insisted, that the defendant was estopped by the return of the sheriff, and could not falsify in this ejectment, but might bring an action against him, if it was made of lands not part of the three manors, &c. and *Sir Simon Harcourt* cited *Br. Ex-tent 13. F. Execution 165.* that if in dower, the sheriff give

gives seisin on the *habere facias seisinam* of more than a moiety, the heir cannot enter, nor maintain an assise, but must have a *scire facias* to admeasure the lands in the return. But as to this, all the court was clear in opinion, that for whatever was comprised in the return, which was not part of the manors in the judgment, the execution was actually void, and advantage might be took of it in the ejectment. Whereupon the counsel for the defendant attempted to prove the lands in the return not parcel of the manors, but being very deficient in their proof, a verdict was given for the plaintiff. *Raymond* counsel with the plaintiff.

BOOTH
v.
LINDSEY.

Henry Ludlow, Esq; et al. *vers.* John Lennard.

JOSEPH Kiffin recovered a judgment in the king's bench against the defendant by *nil dicit* in an action on the case, and a writ of inquisition being executed, final judgment was given against the defendant for 168*l*. Whereupon the defendant brought a writ of error returnable in the exchequer chamber, in *Trinity* term 1704, which was still depending; afterwards Kiffin became a bankrupt, and a commission being took out, the judgment was assigned to the plaintiffs, who as assignees of the commissioners sued out two *scire facias*'s in the king's bench upon the judgment, in which upon two *nichils* returned, they obtained judgment and sued out a *feri facias* thereupon, and took the defendant's goods in execution. Upon which Mr. Squib and Mr. Raymond, moved, that the judgment in the *scire facias* might be set aside as irregular, the writ of error being still depending, and that the defendant might have restitution. The matter being referred to the master, he reported the fact *ut supra*, with this addition, that Kiffin died after the writ of error brought, and after *in nullo est erratum* pleaded. And the court held first, that the writ of error was not abated by the death of the defendant in error after *in nullo est erratum* pleaded. So that the writ of error was still depending. Secondly, that *scire facias* don't lie on a judgment pending the writ of error brought on that judgment, but the writ of error pending is a good plea to the *scire facias*: so that *scire facias* was not regular; but then the three judges, Powell, Powys, and Gould, (*Holt* chief justice being absent) made a question, whether they should set the judgment on the *scire facias* aside on motion, and the execution sued out thereupon, or should drive the defendant to an *audita querela*: but on consideration they all held, the whole proceedings were irregular, and set them aside on motion. Mr. recorder King, and Mr. Southouse counsel for the plaintiff. *Vide* 3 *Lev.* 312. 20 *H.* 6, 4. *Cro. Jac.* 342, 535. 2 *Roll. Abr.* 492. *Stiles* 159.

The death of the defendant in error after *in nullo est erratum* pleaded does not abate the writ of error. *D. acc.* 1 *Vent.* 34. ante 71.

A *scire facias* does not lie upon a judgment the execution of which is suspended by a writ of error. *R. acc.* ante 439.

And 'tis irregular to sue one out.

If a *scire facias* is taken out upon such a judgment, and an award of execution obtained thereon upon two *nichils*, it shall be set aside for irregularity on motion. *R. acc.* ante 439. *Vide* *Salk.* 93. *Str.* 1075. *Bi.* 1183.

The Queen *vers.* Tooley et alios.

S. C. Holt 485. and nearly verbatim with the arguments of the counsel at Serjeant's-Inn. 11 Mod. 242.

A statute authorising the dean, steward, or burgessees of A. to hear and punish incontinencies according to the custom of a place in which the constable of a part may act throughout the whole, does not authorise a constable of a part of A. to act without a warrant from the dean, &c. of A. out of that part.

A constable cannot of his own authority take up any person within his own district without just grounds of suspicion.

'Tis a sufficient provocation to make the killing a man manslaughter only, that he is assisting in unlawfully detaining a third person in prison. acc. ante

143. and see the books there cited. Sed vide Foster 138, 312, to 316. Tho' the person detained is a stranger to the person killing. Sed vide Foster ubi supra. And the person killing did not know the detention was unlawful. Sed vide Foster ubi supra. And the person detaining pretended to be acting as a peace officer. The courts are bound to take notice ex officio of public acts of pardon. Where an offence of which a man is found guilty is pardoned, the court will order a special entry to be made on the roll, that no judgment was given on account of the pardon. If a writ of appeal against a person in the custody of the sheriff is delivered to the sheriff, he becomes immediately in custody upon the appeal warrant.

AN indictment was found against the defendants for the murder of one *Dent*: and upon not guilty pleaded, the jury found a special verdict; that by a statute made the 27 *Eliz.* for the good government of *Westminster*, it is enacted, that for reformation of disorders in that city, the dean, high steward, or his deputy, or two capital burgessees, may hear and punish incontinencies, according to the custom of *London*: that by the custom of *London* any constable of any ward, parish or precinct, may execute his office throughout the whole city: that within the city, borough, and liberty of *Westminster*, it has been used, that every person duly appointed constable of any parish within the liberties of the city, borough, and vill of *Westminster*, his office of constable in and through the whole city and borough of *Westminster* and liberties thereof has executed, and used to execute: that the eighth of *March*, 8 *Annæ*, &c. three commissioners duly appointed by virtue of the act for recruiting the army, for putting the act in execution, by virtue of that act, made their warrant under their hands and seals, directed to the constables of the parish of *St. Margaret's, Westminster*, within the city of *Westminster*, thereby commanding the constables, to make search within the said city and liberty, for persons within the description of that act; which warrant after that day was delivered to *Samuel Bray* one of the constables of the parish of *St. Margaret's*, to be executed: that after that day *Samuel Bray* into the parish of *St. Paul's Covent Garden* in the city and liberty of *Westminster* to execute this warrant did come, and was: that within the parish of *St. Paul's Covent Garden* there was and is a constable belonging to that parish: that *Bray* before sent to *J^s. Dent* to assist him to execute the warrant, that after the said eighth of *March*, between eight and nine at night, at the said parish of *St. Paul's Covent Garden*, the said *Samuel Bray* staying to execute that warrant, one *Anne Dekins* in the street between the play-house and the *Rose* tavern he then and there found, whom he suspected to be a disorderly person, and then and there as a disorderly person took her into his custody, as constable of the city and liberty of *Westminster*, to carry her to prison for her safe custody: that *Anne Dekins* had been before taken up by *Bray* as constable, as a disorderly person; that at her being taken up by *Bray* the eighth of *March* she had not misbehaved herself; that *Bray* had no

warrant to take or detain her: that after the taking of the said *Anne Dekins*, the prisoners (*Bray* then having her in custody) in another place, called *Covent Garden*, did meet (they being all strangers to *Anne Dekins*) drew their swords, and assaulted *Bray*, to rescue her from his custody: that *Bray* shewed his constable's staff, and declared he was about the queen's business, and intended the prisoners no harm; whereupon they put up their swords, and *Bray* carried the woman to the round-house: that the prisoners a little after, the said *Anne Dekins* being in the said prison in *Covent Garden* aforesaid, drew their swords again, and assaulted the said *Bray* on account of the imprisonment of the said *Anne Dekins*, and to get her discharged: that *Bray* called some persons to his assistance, to keep her in custody, and to defend himself from the violence of the prisoners: that *Dent* came to his assistance: that while *Dent* was in the constable's assistance, and before any stroke, one of the prisoners gave *Dent* the mortal wound in the indictment mentioned, of which he died, as in the indictment, &c. that the two others were aiding and assisting him that gave the stroke: but whether the defendants were guilty, &c.

This case was argued last term by Mr. *Raymond* for the queen, and Mr. *Pengelly* for the prisoners, he with Mr. *Lutwyche* being assigned by the court to be counsel for them. Mr. *Raymond* for the queen said, there were two points in the case: first, whether *Bray* was in the execution of his office, for if he were, then it is undoubtedly murder: secondly, suppose he was not, yet it will be murder, because there was not a sufficient provocation. And as to the first point he cited 9 Co. 66. 4 Co. 265. Constables may seize disorderly persons, and were officers at common law. 4 Inst. 265. 10 Edw. 4. 18. a. 5 Hen. 7. 7. b. 22 Ed. 4. 35. and not only disorderly persons, but also suspicious persons, and it being found, that she was a suspicious person, *Bray* had an authority to seize her; and that he may seize suspicious persons, he cited 5 Edw. 3. 14. *Lamb. Iren.* 12. and we must rely upon these cases, because the special verdict only finds her to be a suspicious person. It will be objected to me, that he being constable of *St. Margaret's*, was out of his precinct, when he took her up in *St. Paul's Covent Garden*. To which he answered, that the statute of 27 Eliz. found in the special verdict, has relative words to the city of *London*, and by custom in that city, any constable in the city may execute his authority throughout the city; and though constables are not named in the act, yet others being named, he shall be comprehended: as if a remedial law be made, and only one person mentioned, yet it may extend to others not named, as the statute *de circumspetite agatis*, where the bishop of *Norwich* is only mentioned, yet all other bishops are comprehended, and he cited *Fitz. Ab. tit. Prohibition.* 2 Inst. 487. 1 Rich. 2.

REGINA
v.
TOOLEY.

c. 12. *Plowden Com.* 36. b. It is found, that they have used to execute their authority all over *Westminster*; and though they have not said time out of mind, it is well in this case, being a special verdict; but in pleading, that should have been set forth. 2 *Roll.* 699. *Trin.* 13 *Car.* *Allen v. Graff*: his having a warrant from the commissioners of the recruiting act does not hinder him from seizing a disorderly person in breach of the peace. And perhaps it may be objected, that she was not a disorderly person. To which he answered, that the constable having had her before in his custody, as a disorderly person, might well suspect her again, it being between eight and nine at night, between the playhouse and the *Rose* tavern.

Secondly, suppose that *Bray* was not in the execution of his office, yet here was not a sufficient provocation to extenuate that act of violence, as to make it manslaughter only. For it is found, that she being in custody, the prisoners drew their swords, and assaulted *Bray*; upon which he shewed his staff: now if that were no provocation to the prisoners, then it is murder; for killing a person without provocation is murder. *Hale Pl. Cor.* 45. 3 *Inst.* 52. And perhaps, if she had resisted herself, and killed the constable, it might only have been manslaughter; but it is murder in a stranger. Now speaking words, whereby a man suffers damage in his reputation, it is never allowed to be a sufficient provocation, to make the killing of such person manslaughter only, as in *Kel.* 55. much less should a wrong done to a stranger be sufficient provocation to make it only manslaughter in me, if I kill the person who did the wrong, because it cannot be supposed so great a provocation to me; so that in all cases there must be a proportion in the provocation to the act of violence done after: as if a man break my close, and I with a stake beat his brains out, it is murder, as was held in *Maugridge's* case, *Kel.* 132. because the provocation bore no proportion to the death of the man, and there should be an open act of violence done to make it only manslaughter. He said, he expected *Hopkins Hugget's* case, *Kel.* 59. 137. would be objected; but this case differs from that, because there they came civilly and demanded a sight of the warrant; but in this case the very first act was an assault upon the constables: their swords were drawn, and an actual fighting, which increased the provocation; but here was an assault on the person killed, before a blow given by those of his party; there was no warrant, but here was a known person of the law; therefore upon these reasons he submitted it to the court, first, that *Bray* was in the execution of his office; secondly, if he were not, here was not a sufficient provocation.

Mr. *Pengelly* for the prisoner argued, that *Bray* was not a known officer, because no authority was given to constables by the 27th of *Eliz.* for that act is not universal, like the statute *de circumspēcte agatis*, or the statute of *Westmin-*

After concerning the warden of the Fleet; but it is only a particular jurisdiction given to particular persons, from whom the constable had no warrant; but this warrant was given him by the commissioners of the recruiting act: and though in London the custom may give a jurisdiction to the constables to act all over the city, yet in Westminster there is no such custom. The special verdict finds, that such a custom has been used in Westminster, but does not say time out of mind; and the act of Elizabeth being found, makes it plain, that they don't pretend to such a custom time out of mind. In Hil. 11 Will. 3. the King v. Chandler, ante 545. it was settled, that a constable cannot go out of his precinct; but a justice of peace by his warrant may appoint a constable by name to execute it any where within the jurisdiction of the justice of peace. Secondly, it does not appear that the commissioners were appointed for this particular place or county, but it is only said they were duly appointed commissioners, and by the act of parliament the execution of their warrant is restrained to particular officers within their jurisdiction: and in this case there was a particular constable in Covent Garden, so as there was no failure of justice; and therefore he usurped an authority, and consequently he was a trespasser to all people he took up. But taking him to be a lawful officer, yet that will not justify his acting any thing beyond his authority: it does not appear, that he ever acted under the recruit warrant; and though, if he sees persons fighting, he may restrain them *ex officio*, or take up suspicious persons, yet the taking of this woman was not lawful, for she was very decent at the time, and therefore no cause of suspicion; but they should have found her to be a night-walker, as is usual in such cases. Hearn's Pleader 392. 488, 489. 15 Edw. 1. c. 4. Upper Bench Precedents 111. 218. 522. Upon taking up a suspicious person, it must appear, that there was a just cause of suspicion: as when a man is taken up for felony, if a felony has been committed, it is cause of suspicion, for the cause of suspicion is traversable. 12 Co. 92. Stiles 166. 2 Roll. Abr. 55. 590. 559. 2 Inst. 52. 172. 3 Inst. 118. 221. 2 Vent. 22. Brook commission pl. 3. If the constable had no authority, he was in an actual breach of the peace, and might be indicted, and is liable to all the consequences of it; but where an officer is killed in the execution of his office, there is no doubt, but it is murder. Cro. Car. 371. 537. Jones 429. Hale 56. 4 Inst. 333. But as this case is, if Bray himself had been killed, it had not been murder, much less shall it in killing an assistant. And as to the provocation, though it is found in the special verdict, that they did not see the first arrest, yet they saw her under restraint, and Bray was continuing the trespass, when they came up, and they came to rescue the woman, that was unduly restrained of her liberty; therefore their seeing her under restraint, takes off all im-

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plied malice; and since it is not found, that they were upon an ill design, they cannot be supposed to have any previous malice. There is a very remarkable passage to this purpose in *Stiles* 467. and it is put in *Kel.* 136. which was this: *Bucknall* was indebted to *J. S.* *B.* and *C.* came from the creditor *J. S.* to demand the money; *B.* took a sword that hung up and was in the scabbard, and stood at the door with it in his hand undrawn, to keep *Bucknall* the debtor in, till they did send for a bailiff to arrest him: thereupon *Bucknall* the debtor took out a dagger, which he had in his pocket, and stabbed *B.* this upon a special verdict was adjudged manslaughter, because he was insulted, and imprisoned injuriously, without process of law; and though within the words of the statute of stabbing, yet not within the reason of it. The point they went upon in *Hopkins Huggett's* case, *Kel.* 59. 137. was upon restraining the liberty of the subject. And though it was objected by *Mr. Raymond*, that there was an actual fighting, yet that does not alter the case; for in *Maugridge's* case, the first act of violence being done by *Maugridge*, it was held murder, notwithstanding the resistance that *Cope* made, *Kel.* 136. Now if there was no original malice against *Bray*, there could be no derivative malice to *Dent*, who came to his assistance; for where there is no malice in the principal, it cannot *egredi personam*. *Hale* 50. *Dier*, 128. *Earl of Salisbury's* case. *Plow.* 100. b. *Stiles*, 469. *Kel.* 65. *Thompson's* case. *Kel.* 87. 12 Co. 57. Therefore upon these reasons he submitted it to the court, whether the prisoners are guilty of murder.

Now this term it was argued again before all the judges of England at *Serjeant's-inn* in *Chancery-lane*, upon which argument the judges were divided in their opinion, viz. *Holt* chief justice, *Powell*, *Powys* and *Gould* justices of the king's bench, and baron *Price*, baron *Bury* and baron *Lowell*, that it was manslaughter; and *Trevor* chief justice of the common pleas, *Blencowe*, *Tracy* and *Dormer* justices of the common pleas, and *Ward* lord chief baron, that it was murder. And the last day of the term *Holt* chief justice of the king's bench delivered the opinion of all the judges in the king's bench. He said, that those judges, who were for manslaughter, founded their opinions upon the following reasons: first, that it was a sudden action without any precedent malice, or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her, who was unlawfully restrained of her liberty; and if the woman was unlawfully imprisoned, then it cannot be murder, and cited 4 Co. 40. *Young's* case; 9 Co. 65. *Mackalley's* case, where it is held, that if a constable be killed in the execution of his office, it is murder; but it is otherwise, where he is doing a wrongful and oppressive act: it is not only necessary, that the constable be in the execution of his office, to make the killing of him murder,

murder, but he must give notice, that he is come to keep the peace. *Thompson's case*, *Kel.* 66. and so is *Young's case*, and *Mackalley's case*, to be understood; for if he does not give notice, the party may reasonably suppose, that he came to assist his adversary.

The second point to be considered is, whether *Bray* was in the execution of his office? The statute of 27 *Eliz.* don't mention a constable, only a power given to the dean, high steward, and two capital burgesses of *Westminster*; but it does not follow from thence, that the constable has such a power: we are all agreed, that the power of the constable is no greater than it was before this act. One of the judges held, that *Bray* was constable *de facto*; but that cannot be, since there was a constable at that time in *Covent-Garden*. Now if the constable of one parish has not power over the whole liberty, then *Bray* had no more authority, than if he had been no constable at all. Suppose, for argument's sake, that *Bray* was constable of *Covent-Garden*, I take it, that the taking up the woman was illegal, though she had been in his custody before; and if so, he did not act as a constable, but a common oppressor: the verdict don't find, that she was guilty of any disorderly act, when he had her in his custody before; and it is not a constable's suspecting, that will justify his taking up a person, but it must be just grounds of suspicion, for that is traversable, 2 *Inst.* 52. as if a felony be done, it is good cause of suspicion, that is, if I suspect a person where a felony is done, it is warrant enough for me to arrest him; but it would be hard, that the liberty of the subject should depend on the will of the constable, and shall his not liking a woman's looks be any cause of suspicion?

3. The prisoners in this case had sufficient provocation; for if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion; much more where it is done under a colour of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of *England*. He said, that a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest. 3 *Cro.* 372. 3 *Hen.* 7. 10. Constables have an authority by the statute to arrest persons, but that must be by warrant from the justices of peace; but in this case there was no warrant.

The reasons of the five judges, who were of opinion it was murder, were these: four of them did agree, that *Bray* had no authority, but one was of opinion, that shewing his staff was sufficient; but I never knew that a constable's staff was of so much efficacy, when the constable himself had no authority: four of them held, that she being a stranger to the prisoners, it could be no provocation to them: otherwise if she had been a friend or servant: but sure a man ought

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ought to be concerned for *magna charta* and the laws; and if any one against the law imprisons a man, he is an offender against *magna charta*. We seven hold this to be a sufficient provocation, and we have good authority for it: in *Hopkins Hugget's* case, *Kel.* 59. 137. (and this case is stronger than that) the judges that were of opinion, that the case was only manslaughter, did not found their opinion upon the fight between them, but the provocation by the unlawful imprisonment; and the four, who were of opinion that it was murder, conformed, and gave judgment according to the opinion of the eight: the five judges in this case, who think this case murder, say, that to a relation or friend it is a provocation, but not to a stranger; but this is a distinction not to be met with in our books. He cited *Plowd.* 101. where two fight upon malice prepense, the servant of one of them, not knowing of the malice, comes to assist his master, and kills the other, this is held but manslaughter in the servant; which case is abridged in *Hale* 51. the reason of which case is not because he was servant, but because he knew not of the malice. They say, that *Hopkins Hugget's* case, *Kel.* 59. 137. is *primæ impressionis*; but yet it is of good authority, being given upon mature consideration, and resolved by eight of the judges. They say, likewise, that in the case at bar, it could not be a provocation to the prisoners, because they knew not that she was illegally arrested; but surely *ignorantia facti* will excuse, but never condemn a man. Indeed he acts at his peril in such a case, but he must not lose his life for his ignorance, when he happens to be in the right; and cited Sir *Henry Ferrer's* case, where he was arrested by a warrant, which named him knight, when he was a baronet, and his servant killed the bailiff, and adjudged only manslaughter, because he was arrested upon an ill warrant. Suppose a man having a judgment against him goes abroad, and upon his return is informed that there are bailiffs in his house, he goes and kills one of them; but it proves, that they are thieves that come to rob him; in this case he is in no fault. They objected, that it is dangerous to allow such a power to the mob; but a provocation does not make it an allowing the offence, but only mitigation of the punishment, and for this the law makes the distinction between murder and manslaughter. They say, that the prisoners came after the imprisonment of the woman was over; but certainly the putting her in prison, and not carrying her before a justice, as they should have done, is an aggravation: and why should *Bray* call *Dent* to his assistance after she was in prison? They all agreed, that he was not constable of *Covent-Garden*, and if so, it cannot be murder; for if a writ be directed to the sheriff of *Middlesex*, and the man goes into the county of *Bucks*, the sheriff follows and arrests him in *Bucks*, he kills the sheriff; this is only manslaughter. I am as much

much for a reformation as any one, but in a legal manner; for *vir bonus est quis? qui consulta patrum qui leges juraque servat.* After the chief justice had ended his argument, the counsel for the prisoners prayed the court, that they might be called to judgment, in order to pray their clergy, there being an appeal lodged against them, that they might have it to plead to the appeal; and hoped they might have it, notwithstanding the late general act of pardon, which pardons punishments of manslaughter; and made a doubt, whether they could plead this matter without an actual praying of their clergy, and having it allowed. But the court said, they were bound to take notice of the act of pardon, whereby manslaughter was pardoned; and therefore they must discharge them, but they ordered a special entry to be made upon the roll, that the court would not give any judgment, because of the general act of pardon. Therefore they were discharged, as to the indictment; but there being a writ of appeal delivered to the sheriff, the court held, that they were in custody on the appeal by the delivery of the writ to the sheriff.

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Regina *vers.* Harris.

AT the quarter-sessions holden at *Guildford* the 12th day of *July* the eighth year of the present queen, the justices grant a licence to *George Harris* for keeping a common alehouse; and at the next sessions, *viz.* the fourth day of *October* following, they made this order: "Whereas it appears to this court, that *George Harris* of *Walton* upon *Thames*, &c. doth keep a lewd and disorderly house, it is therefore ordered by this court, that the said *George Harris* be, and is hereby suppressed from keeping an alehouse, &c. after six weeks time from the first day of the present sessions, &c." And this order being removed into the king's bench by *certiorari*, *Mr. Raymond* moved to quash it, because by the 5 & 6 *Edw. 6. c. 25.* there must be a previous conviction, and that by the oath of two men, before the justices can hinder his selling of ale, &c. For by the statute, every man who has a licence to sell ale, is to be bound in recognisance with surety, to keep good orders, &c. and that is to be certified the next quarter-sessions, and they are to inquire whether any such person bound in such recognisances, if they have done any act, whereby they have forfeited the same; and if they have, to award process, to shew why they should not forfeit it. But *per curiam* this order was confirmed, *Holt* chief justice being absent; and by *Powell* justice, the justices in sessions have a power by this act to suppress alehouses, and need not proceed by information or conviction; but they have thereby a discretionary

The sessions or two justices have under 5 & 6 *Ed. 3. c. 25. s. 1.* a discretionary power of suppressing ale-houses within their jurisdiction *ad libitum.*

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tonary power given them to suppress them, without shewing any cause or misdemeanor: and where the act speaks of a conviction, that is only intended where the justices proceed for the penalty, which ought to be by *scire facias*.

The words "in comitatu prædicto" in the body of a justice's order do not refer to the county in the margin.

MR. Pengelly moved to quash an order made by two justices. The exception was, that *Southampton* was in the margin, but it was said in the body of the order to be made by *A. and B. two justices de comitatu prædicto*; so it does not appear, that the two justices were of the county, and it shall not refer to the margin. Which the court agreed, and said, that *prædicto* in orders or (a) indictments don't refer to the county mentioned in the margin, though it (b) does in declarations, and therefore the order was quashed.

(a) Vide ante 386.

(b) Acc. ante 386, R. acc. Bl.

Regina vers. Lane.

S. C. but differently reported 11 Mod. 270. Fort. 275.

A capital bur-
gess may resign
by parol. vide
ante 563.

'Tis not a good
return to a man-
damus to restore
a member of a
corporation that
he consented to
be returned out.

A Mandamus was directed to the mayor, aldermen, and common council of *Gloucester*, to restore to *Lane* the place of a capital burghess. They returned, that *Lane* wrote a certain scandalous letter to an alderman, which amounted to a libel; and that he being charged therewith, at a court afterwards holden, he consented to be turned out, &c. And exception was taken, that this was not a good return of a resignation; for they should have returned, *quod ipse prædictus Lane resignavit*, and that they accepted it, &c. *Powell* justice held, that a resignation might be by parol according to Sir *Jonathan Jennings* case, ante 563, but then it should have been returned more certain, &c. Therefore *per curiam* a peremptory mandamus was granted.

An affidavit that
the cause of an
action is under
the sum men-
tioned in the
damnum of the
declaration can-
not be received.
Vide Say. 219,
240, but see also
Bl. 754. Burr.
578.

AN action was brought in the king's bench, and laid the declaration *ad damnum* of the plaintiff 50s. Serjeant *Richardson* moved the court, that this action ought to have been brought in the court of conscience in *London* by the 1 Jac. 1. c. 14. which enacts, that if the cause of action be under forty shillings, and the defendant a freeman of *London*, it shall be brought in the court of conscience as aforesaid: and he had an affidavit, that the cause was under forty shillings. But by *Powell* justice, it ought to appear upon the trial, that the cause of action was under forty shillings, and he would not take the oath of the party.

A Writ went out to remove an inquisition of *felo de se*, and they return an inquisition *nuper captam*, and upon the return it appeared to be taken after the *teste* of the writ of *certiorari*; and Sir Edward Northey urged, that it was well removed, though taken after the *teste* of the writ, as a writ of error, &c. and by Powell justice, a writ of *certiorari* removes any order or conviction, though they be made or taken after the *teste* of the writ, so they be taken before the return. Then Mr. Raymond took exceptions to the inquisition: First, because it is said to be taken *coram coronatoribus dominae reginae*, and does not say for what place: Secondly, it is said *per sacramentum duodecim*, &c. and don't say *proborum et legalium hominum*, nor for what place: and upon these exceptions the inquisition was quashed.

it was coroner, and that it was taken by the oath of "honest and lawful men," vide ante 926, 388.

A certiorari to remove an inquisition *nuper captam* will remove one taken after the *teste* of the *certiorari* R. acc. ante 836. vide ante 1199.

A coroner's inquisition ought to shew upon the face of it of what place the party who took

Regina vers. Cecill.

MR. Gilbert moved to quash an order of sessions made upon Cecill the master, to pay John Yeoman his servant 7*l.* for wages in husbandry; and took two exceptions to the order: First, that Yeoman was a covenant servant, and that the statute does not extend to covenant servants, though they are servants in husbandry: his second exception was, that by the order, it appears to be made upon the oath of the servant. As to the first exception, Powell justice said, that the statute having always had a favourable construction, has been extended to covenant servants in husbandry: and to the second he said, it would be hard to charge the master upon the oath of his servant upon a private contract or covenant between them, and that is against a rule of law, that any should be a witness in his own cause; and the statute not directing that the servant's oath should be taken in this case, the justices should have proceeded according to the rules of law, and upon this first stirring of it it was adjourned. And the last day of this term, it being moved again by Mr. Gilbert, (a) and the last exception urged again, Mr. Raymond of the same side said, that the justices having grounded their judgment in this order upon the servant's oath, it was not sufficient evidence, to adjudge the money due to the servant; and tho' perhaps he could not have evidence to prove the contract, yet there is no doubt but he might prove the service, and if he had done so, he had put it upon the master to prove the contrary. Mr. Lutwyche for maintaining the order said, that orders

The sessions may make an order for the payment of wages to any servant in husbandry, vide Burn, Servants. II. 7.

But such an order cannot be made upon the servant's oath: Sed nunc vide 20 G. 2. c. 19. 31 G. 2. c. 17. and an order appearing to be made on his oath shall be quashed.

(a) See the act, and it will appear, that it was first intended to extend only to servants who had the rated wages, and not covenant servants; and then if the servant had proved how long he had served, it appeared how much was due: but now they have extended the act to covenant servants, and the masters the mischief in this case, for it will be difficult perhaps for the servant to prove how much he had agreed for; but however he ought not against a rule of law to be admitted to prove it himself. Note to the first Edition.

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differ from actions at law, and it is the constant practice to hear upon the oath of the servant: and though the order says upon the oath of the servant, and hearing his counsel, yet for ought appears, there might be other evidence besides the servant's oath.

Powell justice. The oath of the party has been allowed sometimes in cases of necessity, but there is no necessity in this case, for there might have been evidence of the service: *Powys* justice, and *Gould* justice agreed, and therefore the order was quashed.

Note, Mr. *Puckele* was with Mr. *Lutwyche*, who said the oath of the party was not against law, because it is allowed sometimes in the *Welsh* circuit.

Hutchinson *vers.* Savage.

A general release will not discharge a demand a man had in right of another, if he had any demand in his own right upon which the release could operate at the time of making the release. Q. R. acc. Carth. 118. 3 Lev. 273. 1 Show. 150. Holt 620. D. cont. ante 235. vide ante 235, 662.

George Hutchinson, administrator of John Dawson, brings an action against Robert Savage for goods sold by the intestate to the defendant. The defendant pleads, that the plaintiff, the 15th of Decem. 1708, released to the defendant, his heirs, executors, and administrators, all and all manner of actions, cause and causes of actions, suits, bills, bonds, writings obligatory, debts, dues, duties, accompts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, as well in law as equity or otherwise, which Hutchinson had against him the defendant, &c. The plaintiff replies, and craves oyer of the release; upon which a general release is set out of all debts, dues, and demands, &c. of Hutchinson, so that George Hutchinson, as creditor of Savage (it says, that he and others the creditors of Savage do release him) and then says, that at the making that release the defendant was indebted to him in his own right in the sum of six pounds, and that he gave the release to release that debt, &c. to which the defendant demurred.

Mr. *Ketelby* for the defendant said, that such general releases did discharge the debt due to him as administrator, and cited *Roll. Abr.* 404.

Mr. *Dee* for the plaintiff urged, that the case in *Rolls* had been held not to be law, and that it was certain, if a man grants *omnia bona sua*, goods which he has as administrator do not pass, and cited 3 *Cro.* 6. and that general words in a release are qualified by the particular words 3 *Lev.* 273, and 272, where a bond taken in the name of J. S. to the use of J. D. is not released by a release of all demands, &c. by J. S. to the obligor. *Stokes v. Stokes.* And

And that if the release in this cause had nothing to work upon, then perhaps it would have released this debt due to him as administrator; but as this case is, it shall enure upon the debt due to him in his own right.

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v.
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Powell justice said, that the case in *Ro. Abr.* was taken out of the year book of *Edw. 3. 39 Edw. 3. 96.* at which time the law was held, that a grant of *omnia bona sua* by an executor or administrator pass goods, which they had as executor or administrator; but now that case is held contrary, and there is no difference between a grant and a release; therefore that case of a grant of *omnia bona sua* will govern this present case: but if there had been no other debts for the release to work upon, then it had released this debt. Upon this argument the case was adjourned, and the last paper-day of this term Mr. Raymond for the defendant argued, that it was plainly the intent of the parties, that it should discharge all the debts, as well in his own right, as administrator; for it says, all actions, that we, every or any of us, &c. and every man's deed shall be taken most strongly against himself, as a release to *A. B.* of all actions, releases as well joint actions as several; and as to the objection, that a grant of *omnia bona sua* don't pass goods as administrator, he said, that the case in *Rolle* was well abridged, and a good authority. He cited *1 Leon. 203. Plowd. 209. Ney 106. and Cro. Jac. 318.* where the husband granted to him *jus, titulum, et interesse sua de et in decimis*, which he had in the right of his wife; and held that they pass, though he had them in his wife's right.

Holt chief justice. If he have no goods, but as administrator, they must pass by a grant of *omnia bona sua. Adjournatur.*

Regina vers. Stedman.

AN information was exhibited against the defendant by the addition of gentleman; the defendant pleaded in abatement, that he was an upholsterer, and not a gentleman; and a rule being obtained at the side-bar to amend the information, Mr. Raymond moved at the shewing cause, why it should not be amended, and said, that as they had taken advantage of this mistake by pleading in abatement, the court could not amend it; and cited *Buckson v. Hofkins, Mich. 3 Ann. B. R. ante 1059.* where after *nultiel record* pleaded to a *scire facias*, which mis-recited a judgment, an amendment was denied; and that criminal matters are not within the statute of amendments.

Q. Whether an information can be amended in a point to which the defendant has excepted by a plea in abatement. vide post 1472.

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Mr. *Whitaker* of the same side, that there was no precedent to warrant amendments, after taking advantage of it by pleading, and all the cases mentioned of amendments immediately before trial in informations are only of slips of clerks.

Powell justice said, that informations are the suggestions of the attorney general, which he may amend any time before trial, but it is a question, whether it can be done after advantage took of it by pleading, as in this case. He said, that informations are within the statute of additions, but this ought not to be amended to falsify the defendant's plea, though issue be not joined, and that a *misnomer* in an indictment was not amendable, and he saw no difference between that and an information. If one be indicted by his right name, and he pleads *misnomer* in abatement, and you indict him again, he is estopped to say, that the name he gives himself in his plea is not his right name. Adjourned to search precedents.

If a man be indicted by his right name and plead misnomer in abatement, he is estopped to deny that name, that he gives himself, vide ante 697, and the books there cited.

THE plaintiff brought an action, and was nonsuited, and afterwards he brought another action for the same cause, and a motion was to stay proceedings till he paid his costs upon the first nonsuit, and granted *per curiam*.

Easter Term

9 Annæ reginæ, B. R. 1710.

Memorandum, Sir John Holt knight, lord chief justice of the queen's bench, who had executed that office with great reputation for his courage, integrity and compleat knowledge in his profession, ever since the Revolution (being sworn into that office in Easter term 1689) died March 5, about three in the afternoon, at his house in Bedford-walk, after a long lingering sickness, anno ætatis suæ 68.

Memorandum, March 13, 1709, Sir Thomas Parker knight, her Majesty's youngest serjeant at law, was sworn into the office of chief justice of the king's bench in the room of the late chief justice Holt, at the lord chancellor Cowper's.

Memorandum, March 26, 1710. Sir Henry Gould knight, one of her Majesty's justices of the queen's bench, died at his chambers in Serjeant's Inn in Chancery-Lane, anno ætatis suæ 66.

Memorandum, That May 12, in this present Easter term Sir Robert Eyre knight, her Majesty's solicitor general, and Thomas Pengelly esquires were sworn serjeants at the chancery bar, counted at the common pleas, and gave an entertainment to the nobility, judges, &c. at Serjeant's Inn Hall in Fleet-Street. The motto of their rings was unit et imperat. And the next day being Saturday, May 13. Mr. serjeant Eyre was sworn one of the justices of the king's bench in the room of justice Gould deceased, at the lord chancellor Cowper's, and the same time Mr. Raymond was sworn solicitor general, both their patents being sealed that day.

Michaelmas Term

11 Annæ reginæ, B. R. 1712.

Sir Thomas Cooke Winford *vers.* Powell.

In an indebitatus
assumpsit in an
inferior court
for permitting
the defendant to
use a pond to
wash his horses,
it must appear
that the pond
was within the
jurisdiction.
vide ante 211.
795, and the
cases there cited.

SIR Thomas Cooke Winford brought a writ of error in the king's bench upon a judgment against him in the *Marshalsea* in an action on the case, wherein Powell declared, that whereas the said Sir Thomas Cooke Winford the 12th of June in the seventh year of this queen, at the parish of St. Giles in the Fields in comitatu Middlesex, ac *infra jurisdictionem hujus curiæ*, in consideration, that the said Powell at the special request of Sir Thomas Cooke Winford had permitted the said Sir Thomas Cooke Winford to use the pond in area ipsius Powell situate in the parish aforesaid, ac *infra comitatum et jurisdictionem prædictos*, to water his horses for six months before, and had provided water for the said horses for the said six months, promised the said Powell, that he the said Sir Thomas Cooke Winford would pay the said Powell what he reasonably deserved for the same, &c. and makes the proper averments. Then there is a count upon a *quantum meruit* for goods, &c. sold and delivered. Then follows this count: *Cumque etiam* the said Powell, *postea, scilicet die anno et loco supradictis*, ad *specialem instantiam et requisitionem* ipsius Sir Thomas Cooke Winford had permitted *eundem* Sir Thomas Cooke Winford *habere usum* alius stagni et aquæ ipsius Powell, in area ipsius Powell ad *lavandum et ad aquandum* alios equos ipsius Sir Thomas Cooke Winford: *idem* Sir Thomas Cooke Winford in *consideratione* inde *postea, scilicet die anno et loco supradictis* promised to pay, &c. On non assumpsit pleaded, and issue joined, a verdict was given for Powell for 7s. 6d. damage, and judgment was given for him in the *Marshalsea* to recover the same. And on this writ of error brought, the judgment was reversed, because it did not appear in this last count, that the *aliud stagnum et aqua* of Powell's was within the jurisdiction of the court, which cannot be intended in the case of an inferior jurisdiction, where nothing shall be intended

tended to be within the jurisdiction, that is not expressly averred so to be; though in the case of a superior jurisdiction nothing shall be intended out of it. *Raymond* solicitor general for the plaintiff in error, Mr. serjeant *Comyns* for the defendant. The cases cited for the plaintiff in error were 1 *Saund.* 74. *Peacock v. Bell & Kendall.* Sir *Tho. Jones* Rep. 230. *Wallis v. Squire.* T. *Jones* 103. 3 *Keb.* 677. *Harvey v. Holland.* 3 *Lev.* 234, 243. *Mico v. Morris.* 1 *Ventr.* 2. in the case of *Heely v. Ward,* 1 *Ventr.* 28. *Barkley v. Paine,* and see *Stanion v. Davyes,* intr. *Hil.* 13 *W.* 3. *B. R. Rot.* 179. *Ante* 795. 1 *Sid.* 95. *Littlebury v. Wright.* 1 *Roll. Abr.* 545. p. 3. *Ive v. Storrie.* S. C. *Cro. Car.* 571. *Jones* 451.

WINFORD
v.
POWELL.

Jenkins qui tam, &c. *vers.* Horne in Scaccario.

IN an information upon a seizure of currants imported in the *William and Ann* of *Plymouth* into the port of *London*, contrary to the act of navigation, 12 *Car.* 2. c. 18. s. 14. from *Algiers* in *Africa*, the currants not being of the growth, product, or manufacture of that place, or of the region where they were shipped, &c. The defendant claimed property, and on issue joined, notice was given for trial in *Trinity* term last, and for the sitting after *Trinity* term last. And on motion on behalf of *Charles Moone*, a security for *Horne* on the writ of delivery, the following order was made, *viz.* *Middlesex*, "Whereas a writ of delivery
"for the said ship with her apparel and furniture hath been
"awarded under the seal of this court, upon a recogni-
"sance entered into to her majesty, by *Edward Grose* of *East*
"Smithfield baker and *Charles Moone* of *Mowell* in the coun-
"ty of *Cornwall* cooper, dated the 11th day of *February* last,
"in the sum of 252*l.* now upon the motion of Mr. *Dodd*
"of counsel with the said *Charles Moone*, informing the
"court, that the plaintiff gave notice of trial to be had
"in this cause, the sitting of the lord chief baron within
"the last *Trinity* term in *Middlesex*; in pursuance of which
"notice the said *Charles Moone* attended with his counsel
"and witnesses on the day appointed for the said trial, as
"also on the day of sitting after the said term in *Middlesex*,
"not having received any countermand from the said plain-
"tiff; whereby the said *Charles Moone*, who is at the whole
"charge of the defence made in this cause, was put to
"great expence: it was therefore now prayed that the said
"recognisance might be discharged, and that the said
"*Charles Moone* might have his costs: it is this day ordered
"by the court, that the said recognisance entered into by
"the said *Edward Grose* and *Charles Moone* shall be vacated
"and discharged; and that it be referred to *John Morgan*
"Esq; deputy to her majesty's remembrancer of this court,

If a ship is seized and set at large upon security, the security shall not be discharged on account of the neglect of the prosecutor of an information in support of the seizure to try it according to notice, if he declares he intends to try it the term after the application for the discharge.

The bail for the the defendant in a cause cannot have costs on account of the neglect of the plaintiff to proceed to trial according to notice, tho' they may bear the costs of the defence.

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v.
HORNE.

“ to tax the said *Charles Moore* his costs against the plaintiff
“ in this cause ; unless cause be shewed to the contrary on
“ the last day of *Michælimas* term next.”

Upon the motion of Mr. Attorney General, the solicitor general, and Mr. *Ward*, at the setting down of causes after this term, to which time the order was enlarged, it was discharged ; first, as to the discharging the recognisance upon declaring the plaintiff intended next term to try the cause ; secondly, as to the payment of costs for not going on to trial ; because such order can be made only in behalf of, and upon the motion of the defendant, and his counsel, and not in behalf of the security. Lord chief baron *Bury*, and Lord baron, present in court. Note ; the lord chief baron exclaimed against the order, as being obtained perfectly irregularly without *affidavit*, and by surprise.

Ongley *vers.* Peale.

S. C. 2 Eq. Abr. Devises. P. pl. 3. 1st Ed. p. 358. 8 Vin. 49. pl. 19.

A devise to A. and his brothers successively (without mentioning the order of succession) for their lives, with this condition that they do not enter on or enjoy the premises until a month after their marriages, is sufficiently certain. S. C. 30 Mod 103. And if A. is the elder of the brothers they shall take according to their seniority.

ERROR to reverse a judgment given in the common pleas for *Peale*, in an ejectment for houses on *Ludgate-bill* in *London*, on the demise of *Oliver St. John*, brought against Mr. *Ongley*, and four other tenants : on not guilty pleaded ; as to all the defendants but Mr. *Ongley*, and as to all the houses but one, the jury find for the defendants ; and as to that one house they find a special verdict, viz. that the 12th of *January* 1668, *Oliver* earl of *Bolingbroke* was seised thereof in fee, and being so seised the said 12th of *January* made his will. [Note, that will was not found in *hæc verba* in the special verdict, nor the devises therein contained] and that the 20th of *May* 1679, he being seised as aforesaid, *debite modo fecit, sigillavit, et publicavit* a codicil in writing to the said will annexed, which follows in *hæc verba* “ *May* 20, 1679. Memorandum : Whereas my uncle “ *Anthony St. John*, and my dearest and beloved wife, whom “ I made my sole executrix, are dead : that as to what I “ left to them I revoke this my said last will and testament “ in manner following : First, as to the 2000*l.* given my “ dear wife out of the manor of *Melchbourne* I give and “ leave it to Sir *St. Andrew St. John* of *Woodford*, also my “ impropriation of *Thurley* to him and his heirs : I “ give to him and his brothers successively for their “ lives my house at *Ludgate* [the house in question] “ with this condition nevertheless, that the said 2000*l.* “ be not paid to Sir *St. Andrew*, nor the impropriation “ of *Thurley* entered on, till within a month after his “ marriage. And as for my house at *Ludgate* I do “ not leave it to him, nor his brothers, afore to be en-
“ tered

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“tered on and enjoyed, till such time also after their marriages; as for all my other lands, &c.” That the earl died seised; that at the making the codicil Sir St. Andrew had two brothers, Rowland and Oliver, that Sir St. Andrew was eldest, Rowland the second, and Oliver the third; that Rowland died in the life-time of Sir St. Andrew and Oliver, that Sir St. Andrew died 10th of February 1708, that Oliver was married divers years before Sir St. Andrew’s death, and is yet living; that Oliver entred after Sir St. Andrew’s death, and demised to the plaintiff, &c. Upon which special verdict judgment was given for the plaintiff in ejectment in the common pleas. Whereupon Mr. Ongley brought this writ of error in the king’s bench. And it was argued by the solicitor general for the plaintiff in error, that the devise was void for incertainty, certainty being as much required in the case of a will as to the person, as in the case of a deed; as a devise by A. to his son, where he has two, is void, because *non constat* which he meant, *Cro. Eliz.* 743. in the case of *Taylor and Sayer*. Now here it is uncertain by reason of the word successively not shewing which shall take first, and which second, in succession. That the construction ought to be made from the words, but in case of a deed such a limitation had been void, *Hob.* 313. *Cro. Jac.* 264. *Hutt.* 87. *Windsmore v. Hobart* in point, and *Hob.* 314. *Greenwood v. Tyler*. But there is no reason in a will, when the words are the same, to put a different construction upon them. But if it had been *successive sicut nominantur in charta*, &c. it had been good in a deed. *Dier* 361. So it would be in a will.

Secondly. The condition in relation to marriage makes it more uncertain, for till marriage none can take; and suppose the second brother had married, and neither of the other two, who must have took? Certainly none of them. Or if he that is married should take first, then that would overthrow the other construction of *successive*, that the oldest ought to take first, and then the second, and then the third. Objection; the intent is apparent. Answer 1. The intent must be collected from the words, but the words, as was said before, import no such thing, and nothing can be averred *dehors* for their explanation. Secondly, the intent cannot controul the operation of law; as a devise to J. S. for life without impeachment of waste, remainder to the heirs males of his body, the deviser intends only an estate for life to J. S. yet the law supervenes his intent, and he will be tenant in tail. 2 *Leon.* 70. *Chaloner v. Bowyer*, and by *Hale* chief justice in the case of *King and Melling.* 1 *Ventr.* 214, 225.

Mr. serjeant *Pengelly* argued for the defendant in error, that the devise to Sir St. Andrew was a direct devise to him,

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as appears by the preceding words ; that that could not be avoided by doubtful expressions after that the devisor took notice of the brothers, according to the rules of common law, which was according to their seniority : that what he meant by *successive* is plain, and therefore in a will ought to take effect, for which purpose there are stronger cases in the books, as *Raym.* 82. *Bate v. Amherst & Norton*. A devise to one of his cousin *Amherst's* daughters, who should marry a *Norton*, held good to the first that married a *Norton*, *Dier* 313. 6. Devise to *J. S.* on condition, and then that it should remain to his house : held a good remainder, because they construed his house the head of his family. *Stiles* 434. 5. *Moor* 637. *Br. Lease* 64. he likewise cited as apposite cases.

Secondly, the clause about marriage made no alteration in the exposition of the will ; only added a restriction to the devise, which before was general ; and therefore if the second son married before the eldest, yet he could not take by this devise ; which the court agreed, and took it to be a mighty plain case, and affirmed the judgment *nisi causa*, &c. But Mr. attorney general, who was to have shewn cause, taking it to be clearly against him, never did shew cause, and so the judgment was affirmed against Mr. *Ongley*, who was a purchaser for a valuable consideration by the advice of Mr. serjeant *Pemberton*, and Mr. *Richard Webb* of the *Inner Temple*. And my client told me, Mr. *Webb* on a further and late consideration adhered to his former opinion that the devise was void for uncertainty. Note, *Oliver St. John* takes but an estate for life by the will, and so the sale by *Powlett* earl of *Bolingbroke*, heir at law, and brother to earl *Oliver*, to Mr. *Ongley*, will be good as to the fee.

Anno primo Georgii regis.

Memorandum, On Sunday August 1, 1714, at half an hour past seven in the morning her majesty queen Anne died at Kensington, in the fiftieth year of her age, being born the 6th of February 1664. Upon her decease the lords, and others of her late majesty's privy council, immediately met at St. James's, where the instruments signed by his majesty, and sealed by him, pursuant to the act of parliament of 6^o of the late queen, appointing several lords to be added to those appointed by the said act of parliament to be regents during the king's absence, were produced by the lord archbishop of Canterbury, the lord chancellor Harcourt, and Monsieur Krienburg the Hanover minister, and opened and read, and afterwards ordered to be inrolled in chancery.

The regents by the act of parliament were,

Thomas lord archbishop of Canterbury.
 Simon lord Harcourt, lord chancellor.
 Charles duke of Shrewsbury, lord treasurer.
 John duke of Bucks, lord president of the council.
 William earl of Dartmouth, lord privy seal.
 Thomas earl of Strafford, first commissioner of the admiralty.
 Sir Thomas Parker, lord chief justice of the king's bench.

The regents appointed by the King, by the three instruments under his hand and seal.

William lord archbishop of York.
 Charles duke of Shrewsbury.
 Charles duke of Somerset.
 Charles duke of Bolton.
 William duke of Devonshire.
 Henry duke of Kent.
 John duke of Argyle.
 James duke of Montrose.
 John duke of Roxborough.
 Thomas earl of Pembroke.
 Arthur earl of Anglesea.
 Charles earl of Carlisle.
 Daniel earl of Nottingham.

Mountague

Anno primo Georgii regis.

Mountague Venables earl of Abingdon.

Richard earl of Scarborough.

Edward earl of Orford.

Charles lord viscount Townshend.

Charles lord Halifax.

William lord Cowper.

Then all the lords of the late queen's privy council present took the oaths of privy counsellors, the great officers, who used to be sworn in council, took the oaths of their offices, and then the lords justices took the oaths of allegiance and supremacy, &c. according to that act.

All the judges, king's serjeants, attorney and solicitor general, and king's council, took their oaths before the lord chancellor at his house, as if they were newly admitted, though by that act they were continued but for six months after the queen's demise.

And all other officers, who held their offices during pleasure, took their oaths of office (who had oaths of office to take) in the same manner as if newly admitted.

Note, it being made a question among the lords justices (who assembled in a room by themselves distinct from the council, where they transacted matters, which they determined without the assistance of the privy council, and only came into the council chamber, when they held a privy council, and then sat on a row on the side of the table, on the right hand of the king's chair, those of the first quality sitting in the middle of that side of the table) whether the officers, justices of peace, &c. could act before they took their oaths of office (which could not be immediately done, because dedimus's were to issue for that purpose): it was held by the lords justices, that they ought to take the oaths of office in convenient time, but that in the interim they might act, otherwise the whole design of the act of parliament would be evaded, which was, that on the demise of the crown, there might not be a vacancy of officers in case of necessity; but if they could not act till they had took their oaths of office, there would be a vacancy, which mischief the act intended to prevent. And at this resolution the lord chancellor Harcourt, lord Cowper, and lord chief justice Parker were present, and therefore they issued a proclamation, to give notice of that cause in the act continuing officers, and requiring them to take the oaths, and thereby commanding all officers to take the oaths of office with the first opportunity, and to act in the mean time.

A list of the principal officers in the law at the time of the decease of her late Majesty Queen Anne, August 1, 1714.

SIMON lord Harcourt, lord chancellor of Great Britain.

Sir John Trevor knight, master of the rolls.

Sir Thomas Parker knight, lord chief justice of the king's bench.

Sir Littleton Powys knight,
Sir Robert Eyre knight,
Sir Thomas Powys knight, } justices of the king's bench.

Thomas lord Trevor, lord chief justice of the common pleas.

Sir John Blencowe knight,
The hon. Robert Tracy esquire,
Robert Dormer esquire, } justices of the common pleas.

The right honourable Sir William Wyndham baronet, chancellor of the exchequer.

Lord chief baron vacant.

Sir Thomas Bury knight,
Robert Price esquire,
Sir William Banister knight, } barons of the exchequer.

John Smith esquire, baron, and lord chief baron in Scotland.

Sir William Simpson knight, curfitor baron.

Lord Berkley of Stratton, chancellor of the duchy of Lancaster.

Sir Edward Northey knight, attorney general of the duchy of Lancaster.

Sir Joseph Jekyll knight,
Sir Nicholas Hooper knight, } queen's two first serjeants.

Sir Edward Northey knight, attorney general.

Sir Robert Raymond knight, solicitor general.

Sir

Anno primo Georgii regis.

Sir John Cheslyre knight, queen's serjeant.

<i>Sir William Whitlock knight,</i>	} <i>queen's counsel.</i>
<i>John Conyers esquire,</i>	
<i>Edward Jeffreys esquire,</i>	
<i>Thomas Lutwyche esquire,</i>	
<i>John Ward esquire,</i>	

Justices of Wales.

<i>Sir Joseph Jekyll knight,</i>	} <i>justices of Chester, Flint, &c.</i>
<i>Edward Jeffreys esquire,</i>	
} <i>Montgomery and Denbigh.</i>	

<i>Charles Cox esquire,</i>	} <i>justices for Brecknock, Gla-</i>
<i>William Bridges esquire,</i>	
} <i>morgan and Radnorshires.</i>	

<i>Merrick, esquire,</i>	} <i>justices for Carnarven, Me-</i>
<i>William Jessop esquire,</i>	
} <i>rioneth and Anglesea.</i>	

<i>Francis Winnington esquire,</i>	} <i>justices for Caermarthen,</i>
<i>Edmund Bridges esquire.</i>	
} <i>Pembroke and Cardigan.</i>	

Memorandum Tuesday September 21, 1714, being the next day after the king had made his public entry into London from Greenwich, the lord viscount Townshend, one of his majesty's principal secretaries of state, by his majesty's command, fetched the great seal from the lord Harcourt; and the next day being 22 September 1714, it was delivered to the lord Cowper with the title of lord chancellor of Great Britain, and that day he took the oaths in council at St. James's.

Memorandum, That Thursday October 14, supersedeas's passed the great seal, to remove the lord Trevor from being chief justice of the common pleas, Sir Thomas Powys from being one of the judges of the king's bench, and Sir William Banister from being one of the barons of the exchequer, and Sir Robert Raymond from being solicitor general; and patents passed the great seal, for appointing Sir Edward Northey his majesty's attorney general, and Nicholas Lechmere esquire his majesty's solicitor general, and they took the oaths of office at the lord chancellor's Saturday the 16th of October following.

Memorandum, Friday October 22, 1714, Spencer Cowper esquire, and John Fortescue Aland esquire, were appointed attorney

attorney general and solicitor general to his royal highness the prince of Wales.

Memorandum, That Tuesday October 26, 1714, Sir Peter King knight, recorder of London, and Sir Samuel Dodd knight, of the Inner Temple both, and Sir James Mountague knight, of Lincoln's Inn, appeared to writs returnable in Chancery, commanding them to take on them the degree of serjeants at law, and they were coifed by the chief justice of the king's bench in the treasury of the common pleas, and afterwards performed the usual ceremonies at the bar of the common pleas, and gave rings with this motto: Plus quam speravimus.

Memorandum, That Thursday November 4, 1714, Sir Joseph Jekyll and Sir Thomas Fowys took their places as first and second king's serjeants, being sworn at the lord chancellor's the day before.

Memorandum, That Monday November 21, 1714, Sir Thomas Parker knight, was sworn chief justice of the king's bench, and Sir Littleton Powys, Sir Robert Eyre, and John Pratt esquire serjeant at law, were sworn justices of the same court; Sir Peter King knight, was sworn chief justice of the common pleas, and Sir John Blencowe, Robert Tracy and Robert Dormer esquires, were sworn justices of the common pleas; Sir Samuel Dodd was sworn chief baron, and Sir Thomas Bury, Robert Price, John Smith, and Sir James Mountague, were sworn barons of the exchequer. And the salaries of the two chief justices, and chief baron, were increased from 1000*l.* to 2000*l.* per annum, and the salaries of the rest of the judges were increased from 1000*l.* to 1500*l.* per annum, for which they had distinct patent from those by which they were appointed judges.

Michaelmas Term

I Georgii regis, 1714.

December 6. 1714. Chancery.

Mary Spendlove daughter of
Charles Spendlove and Mary
his wife, who was sister of } Plaintiffs.
John Lambert deceased,

John Aldrich and Mary his
wife, Henry Capps, Samuel
Hartly, Samuel Wade and } Defendants.
John Wade,

If a man makes two persons his executors and residuary legatees and dies, and then one of the executors becomes a bankrupt, a legatee under the will is intitled to recover from the other out of any part of the testator's estate in his hands what remains due of his legacy, notwithstanding he had received interest upon it from the bankrupt for several years after it became payable, if the bankrupt would not during that time pay the principal, particularly if he were an infant during that time.

ON an appeal from a decree of the master of the rolls on a bill brought by the plaintiff *Mary Spendlove*, for the recovery of a legacy of 200*l.* devised to her by her uncle *John Lambert*. The case was this: *John Lambert* being seised in fee of lands, &c. in *Norfolk*, and possessed of a considerable personal estate, 8 June 1696. by his last will devised to the plaintiff 200*l.* at her age of fifteen years, if she should so long live, and in the mean time to be put out by his executors for her best advantage, till she attained her said age, and gave by his said will several other legacies, and particularly 100*l.* to the defendant *John Wade*, then an infant, and devised all the rest of his real and personal estate, after debts and funeral charges, to the defendants *Henry Capps*, and *Samuel Wade*, who was then an infant, and made them joint executors of his said will.

Notwithstanding he proved for his legacy under the commission and received a dividend upon

John Lambert died soon after, *Henry Capps* alone proved the will, the other executor the defendant *Samuel Wade* being then and long after an infant, viz. born 20 September 1692.

it; and notwithstanding the executors settled their accounts before the bankruptcy, and such legacy was left in the hands of the bankrupt. If the solvent executor were an infant until after the bankruptcy, such legatee is intitled to recover from his guardian whatever money he received on account of the infant's residuary bequest, altho' he might apply the whole of it to the infant's maintenance. If such guardian dies, and the legatee files a bill against a man he appointed executor but who declined acting, and his administrators, none of the defendants are intitled to costs.

The

The plaintiff *Mary Spendlove* was born the 6th of *March* 1685, and came to the age of fifteen the 6th of *March* 1700, when the 200*l.* legacy became payable to her, which she applied to *Capps* for, but he not paying, she received interest of him for part of the time before he became a bankrupt.

In 1704 *Henry Bonett*, being admitted by the ecclesiastical court at *Norwich*, guardian and curator to the defendant *Samuel Wade*, settled accounts with *Capps* on behalf of *Samuel Wade*, in relation to *John Lambert's* personal estate, and 200*l.* was left in *Capps's* hands to pay the plaintiff; and the defendant *Samuel Wade's* share of the surplus of *Lambert's* estate came to 824*l.* 16*s.* 1*d.* which was left in *Capps's* hand, and he agreed to pay interest for it; after which *Bonett* received of *Capps* 198*l.* 10*s.* 1*d.* of which 29*l.* 13*s.* was for interest.

Capps in *July* 1707 became a bankrupt, and in *August* 1707 a commission issued out against him, and he was found a bankrupt. The plaintiff came into the commission, and proved this 200*l.* legacy as her debt, and 16*l.* due for interest 6 *July* 1707. and received her dividend of 5*s.* in the pound.

Bonett also as guardian to *Wade* came into the commission for 744*l.* 1*s.* part of the said 824*l.* 16*s.* 1*d.* and received his dividend, 186*l.* 2*s.* 6*d.* which added to the 189*l.* 10*s.* made 384*l.* 12*s.* 6*d.* out of which he had made considerable disbursements for the defendant *Wade*.

After this in *June* 1708 the plaintiff *Mary Spendlove* filed her bill against *Capps*, *Samuel* and *John Wade*, and *Bonett*, and the assignees of the commission against *Capps*, for a satisfaction of the 200*l.* legacy given her by *John Lambert's* will. *Capps* put in his answer, confessed assets of *Lambert* came to his hands sufficient to pay all his debts, legacies, &c. his own bankruptcy, a certificate and confirmation of it by the lord chancellor, &c. and insisted on that as a discharge of his debts. The defendant *Wade* by *Bonett* his guardian put in his answer, setting out the facts above alleged; and *Bonett* put in his answer, and thereto annexed a particular of the writings and securities sent to him by *Capps* belonging to *Lambert's* estate, and a copy of the account he made up with *Capps*.

Bonett having made his will, and thereby having subjected his real and personal estate to the payment of his debts, &c. and having appointed *Samuel Hartly* executor, died soon after

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v.
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ter his answer put in. *Hartly* refusing to act, administration with the will annexed of *Henry Bonett* was granted to *Mary* his only daughter, wife of the defendant *John Aldrich*.

The plaintiff brought a bill of reviver against *Aldrich* and his wife, *Hartly* and *Samuel Wade*, praying a discovery of *Bonett's* estate from *Hartly* and *Aldrich* and his wife. *Aldrich* and his wife in their answer set forth, that they had accounted for *Bonett's* estate before Mr. *Orlebar* one of the masters of this court, pursuant to a decree in a cause, wherein the creditors of *Bonett* were plaintiffs against *Hartly* and *Aldrich* and his wife; and that by the master's report it appeared, the whole real and personal estate of *Bonett* was not sufficient to pay his debts by mortgages and bonds by 675*l*.

The plaintiff having replied, and witnesses having been examined, the cause was heard before the master of the rolls, the 24th of November 1713, who decreed, that it should be referred to Sir *Thomas Gery*, to take an account of the personal estate of the testator *John Lambert* come to the hands of *Henry Capps* and *Samuel Wade*, the residuary legatees, or to the hands of *Henry Bonett*, as curator of *Samuel Wade*; his Honor declaring, that what money was paid by *Capps* to *Bonett* of *Lambert's* estate, on the account of *Samuel Wade*, before *Capps* became a bankrupt, and what money was received by *Bonett* for interest of *Samuel Wade's* residuary part of *Lambert's* estate, and also what money was received by Mr. *Bonett* under the commission of bankruptcy for *Samuel Wade's* dividend, or any dividend to *Bonett* on account of *Samuel Wade* in respect of the money which *Capps* owed *Samuel Wade* on the balance of his said account made up between *Bonett* and *Capps*, was still the estate of *Lambert*, and liable to the payment of the said plaintiff *Spendlove's* demands, in regard the said residuary legatees could take nothing by the will of *Lambert* until all his debts and legacies were paid: and the master was to distinguish what of *Lambert's* estate remained in specie; and what upon the account should appear to have been received by *Bonett* as aforesaid, the same was to be made good out of the real and personal estate of *Bonett*; and *Aldrich's* wife and *Hartly* were to account for his estate, &c. and what remained due of the 200*l*. legacy with interest from her age of fifteen, and her costs, were to be paid the plaintiff out of what had been received by *Bonett*, and made out of his estate, and out of the assets of *Lambert*, that should appear to be remaining in specie in *Aldrich*, his wife's, or *Hartly's* hands; and *Aldrich*, his wife, and *Hartly*, were to have no costs.

From

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ALDRICH.

From this decree *Aldrich* and his wife, *Hartley* and *Samuel Wade* appealed; which appeal was heard before the lord chancellor *Cowper* December 6, 1714, at which time it was insisted on for the appellants, that the plaintiff after she was intitled to her legacy had accepted *Capps* as her paymaster, by letting the money lie in his hands, and receiving interest of him for it some years before he became a bankrupt. Secondly, by coming into the commission of bankruptcy, proving her debt, and receiving her dividend after he had failed, out of his estate. Thirdly, that *Capps* had accounted with *Samuel Wade's* guardian only for the surplus, and had retained money in his hands on that account to satisfy the plaintiff's legacy. Fourthly, that what the guardian *Bonett* had received of *Capps* for interest, or upon the dividend, was received as out of the surplus belonging to *Samuel Wade*, and applied for his maintenance and education. Fifthly, that *Hartley* having never acted as executor to *Bonett*, and *Aldrich* and his wife, having accounted before the master pursuant to a decree of this court, ought to have had their costs.

But the lord chancellor declared, he was of opinion, that the decree was right; for it appearing by the proofs, that the plaintiff had often applied to *Capps* for her legacy, but could not get it out of his hands, she was in the right to get the interest, when she could not get the principal: besides, during the time she received the interest, she was under twenty-one, and therefore her accepting of interest could not prejudice her. And her coming into the commission, and receiving a dividend would be no obstruction to her following *Lambert's* assets till she had a full satisfaction; and what was received by *Bonett* of *Capps* must be looked on as the estate of *Lambert*, and could not be a surplus, till all the debts and legacies of *Lambert* were paid. That the account settled between the guardian and *Capps*, and the leaving money in *Capps* hands to pay the plaintiff could not possibly bind her, she not being party, or consenting to that transaction; nor could the application of the money received by *Bonett* any way affect her interest, it remaining as to her, *Lambert's* estate still, and liable to her legacy. He thought likewise the appellants ought not to have costs, and affirmed the decree. *Mr. Vernon* and *R. Raymond* with the appellants.

Cliffe et alii *vers.* Gibbons, Kadwell, et alios.

December 8, 1714. Chancery.

Words in a devise expressive of the whole interest in lands, will pass the whole interest. D. acc. ante 187. and see the books and cases there cited.

If a man by his will authorise his wife to sell his lands, goods, and chattels, if need should be, to pay his debts and legacies, and gives her the residue of his estate, the whole interest in his lands passes to the wife. vide Cowp. 43. 308, 420.

If a man gives the same person two legacies of the same amount one by his will, and the other by his codicil, parol evidence is admissible to prove that he intended the legatee should have both. Vide Bl. 60.

1 Bro. Cha. Caf. 31, 85.

but see also

3 P. Wms. 353.

1 Bro. Cha. Caf. 296.

Parol evidence is admissible to

prove out of what fund a testator intended particular legacies should be paid.

UPON hearing this day, the case appeared to be this, viz. *Ranceford Waterhouse* being seised in fee-simple of a plantation and several lands, &c. in *Jamaica*, the 15th of *November* 1688, made his will in writing, and thereby directed that all his debts should be paid as soon as conveniently could be after his decease together with his funeral and other charges, and thereby gave power to *Elizabeth Waterhouse* his wife (if need should be) to sell his lands, tenements, servants, goods and chattels in *Jamaica*, and his leases, shipping and goods in *England* to raise money to pay the same, and then to pay such legacies as are given by his will; among which he gave his said wife 1000*l.* to be by her detained out of the first money that could be raised by the profits or sale of his estate, after payment of his debts: and the residue of his estate, after debts and legacies paid, he gave to his said wife, whom he made sole executrix; and soon after died. She proved the will, and entred upon, and possessed herself of, the real and personal estate both in *Jamaica* and *England*, and by perception of the profits thereof paid all his debts, funeral charges and legacies, and so did not sell the *Jamaica* estate. *Elizabeth Waterhouse* the 13th of *April* 1711 made her will, and gave all her estate in *Jamaica* to the defendant *John Gibbons*, and his heirs upon trust to pay the plaintiff *Cliffe* 1000*l.* by yearly payments out of the neat produce (after all charges deducted) and then to pay several other legacies; and after payment of all the said legacies, she gave that estate to the defendant *John Gibbons* and his heirs. She being also seised and possessed of both real and personal estate in *England*, she charged it with the payment of several legacies, and (among others) with 30*l.* to the defendant *John Kadwell*, and 250*l.* apiece to the defendants *Mary* and *Anne Kadwell* his daughters. And the residuum of her estate in *England* she gave to the plaintiff *Cliffe*, and made the plaintiff *Cliffe* and the defendant *John Gibbons* executors.

November 30, 1712. *Elizabeth Waterhouse* the testatrix signed a note as follows, viz.

If a man has an estate abroad and an estate here, and dies while part of the produce of his foreign estate is at sea coming hither, such produce is to be considered as part of his foreign estate.

“*London, November* 30, 1712. “*Cousin John Gibbons*, in case I die, pay unto my cousins *Mary* and *Ann Kadwell* 250*l.* a-piece, and 70*l.* more to my cousin *John Kadwell*

“for

"for mourning, and place it to my account, and it shall be allowed you.

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† "The mark of Elizabeth Waterhouse;"

she then not being able to write her name as usual: which note upon a contest in *Doctors Commons* was made a codicil to the said will. And the plaintiff *Cliffe* and defendant *Gibbons* joined in the probate.

The testatrix at her death had about 80 hogshheads of sugar upon the high seas coming from *Jamaica* for *England*, of which 32 were lost; the rest afterwards came to *England*, and were possessed by the defendant *John Gibbons*.

This being the fact, *Mary Cliffe* the plaintiff brought her bill against *John Gibbons* and the *Kadwells*, to have an account of the personal estate of *Elizabeth Waterhouse*, of which the defendant *Gibbons* possessed himself, to have her 1000*l.* legacy charged on the *Jamaica* estate, to have the 250*l.* and 250*l.* and 70*l.* legacies given the *Kadwells* paid out of the *Jamaica* estate; and to have an account of the sugars, as part of the *English* estate. To which all the defendants put in their answers, and witnesses were examined, &c. The *Kadwells* brought a cross bill against *Cliffe* and *Gibbons*, the executors of the will of *Elizabeth Waterhouse*, for their legacies given by the will and codicil, &c. And on hearing both causes this day before the lord chancellor *Cowper*, the first question was, whether *Elizabeth Waterhouse* was seised in fee of the *Jamaica* estate, so as to have a power to charge it or not; for the defendant *Gibbons* (whose mother was heir at law to *Ranceford Waterhouse*, and who had conveyed the *Jamaica* estate to her son the defendant) insisted that she only had a power given her by her husband's will to sell, which she never executed, but by perception of the profits paid his debts, &c. that by the words, the rest of his estate, which he devised to her, only an estate for life passed, and that the reversion descended to his heir at law, under whom he claimed, and consequently, that *Elizabeth Waterhouse* could not charge the 1000*l.* upon that estate for the plaintiff's benefit.

But the lord chancellor *Cowper* was clear of opinion, that a fee passed by the devise of all the rest of his estate to his wife *Elizabeth*, subject to the payment of his debts, &c. and decreed the 1000*l.* to be paid to the plaintiff. See 3 *Mod.* 45. *Reeves v. Winnington*. A. devises all his estate to J. S. a fee passes. 1 *Ro. Ab.* 834. *Stile* 193, 281. *Johnson v. Kerman*. 3 *Keble* 245. *Wilson v. Robinson*. 3 *Mod.* 228. *Hyley v. Hyley*. And the lord chancellor held, that where a man devises all his estate, goods and chattels, and no mention had been made before in the will of lands of which

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the testator was seised in fee, a fee-simple will not pass; but where a real estate is mentioned before in the will, and then such words follow, a fee passes.

The next question was, whether the *Kadwells* should have each of them two sums of 250*l.* one by the will, and the other by the order. And upon reading witnesses, who deposed, that the testatrix took notice she had given them 250*l.* by the will, and said she would make it up 500*l.* both sums were decreed them, and also that it should be paid out of the *English* estate, which appeared to be her intent by the deposition of witnesses:

The third question was, whether the sugars, that were on the seas at the testatrix's death, should be esteemed as a part of her *Jamaica* or *English* estate. And decreed, that it not being arrived in *England* before her death, and the trusts being to be performed by the will out of the neat produce of the *Jamaica* estate, it should be took as part of the *Jamaica* estate.

Hilary Term

1 Georgii regis, 1714.

Rex *vers.* Bradford.

February 9, 1714.

IN a *scire facias* brought in the petty-bag, it was set out, that the 13th day of March last past at *Westminster* in the county of *Middlesex*, *Isaac Pyke*, the defendant *Bradford*, and others, *per quoddam scriptum suum obligatorium sigillis suis figillatum cognoverunt, et quilibet eorum cognovit, se teneri et firmiter obligari serenissimae dominae Annae nuper reginae Magnae Britanniae, &c. defunctae in 500l. solvendis dictae nuper reginae executoribus vel administratoribus suis*, which was not paid to the queen in her life, nor yet to the king; therefore the writ commanded the sheriff of *Middlesex*, to summon the defendant *B.* to be in chancery, &c. *in crastino animarum* next following, to shew why execution should not be against him, &c. *teste 4 Octob. 1 Georgii.* Upon *scire feci* returned, the defendant appeared, and demurred to the writ, and the attorney general joined in demurrer. And Mr. *Peere Williams* and Sir *Robert Raymond* for the defendant took exception, that this bond was not framed according to the statute of 33 *Hen. 8. c. 39.* and consequently it had not the effect of a recognisance, nor could a *scire facias* lie thereon; for the money was made payable to the queen her executors and administrators, and therefore also was entered into to her, in her natural capacity. See *Moore 193. pl. 342. Andersf. 129. Scroggs v. Lady Gresham*: and see the statute of 33 *Hen. 8. c. 39. f. 50.* Mr. solicitor general *Lechmere* for the king; of which opinion was the lord chancellor, and gave judgment for the king. See 2 *Co. 92. Mich. 35 Hen. 6. 29. b. pl. 34.*

A bond to the king, his executors and administrators under 33 H. 8. c. 39. f. 50. of the force of a statute staple.

Trinity Term

I Georgii regis, 1715.

Redshaw *vers.* Brasier et uxorem, et alios.

October 18, 1715. Chancery.

The loss of a part of the personal estate of a freeman of London by the insolvency of his executor shall fall first upon the testamentary part of it; not upon that and the customary parts *pro rata*.

UPON exceptions to Mr. Lovibond the master's report, the case was this: *Joseph Anderson* a freeman of London having issue by his first wife, *Juliana* (who was the first wife to the plaintiff *Redshaw*, and to whom he had took out administration) and *Hannah* wife of *Brasier*, and by *Barbara* his second wife (who after *Anderson's* death married also the plaintiff *Redshaw*, and to whom after her death, he also took out administration) *Joseph, William*, and *Jane* (who died in her father's life-time) 15th of September 1701 made his will, and thereby directed, that an inventory should be took of his personal estate by his executors, and that *Barbara* his wife should have her widow's chamber, and after his debts and funerals paid, gave her a third part of his personal estate; another third part he gave equally amongst his children, *Juliana, Hannah, Joseph, William*, and *Jane*; and the remaining third part he gave as follows, *viz.* 740*l.* to *Hannah*, 200*l.* a-piece to *Joseph, William*, and *Jane*, and the overplus (if any) to be equally divided among four of his children, and to be paid them by his executors, *viz.* to his sons at the age of twenty-one years, and to his daughters at twenty-one, or marriage; and if the third part of his personal estate in his dispose should by bad debts or other accidents fall short, and not be sufficient to pay all his said legacies, he willed each of his said legatees should bear such loss, whatever it amounted to, in proportion according to their legacies, and made *James Duck, Joseph Chandler, Samuel Greenhill* and *Thomas Greenhill* executors; and died in April following.

Mr. *Duck*, Mr. *Chandler* and *Thomas Greenhill* only proved the will, and exhibited an inventory of their testator's personal

sonal estate into the chamber of *London*, and entred into the usual recognizance, and paid *Barbara* the widow, and Mr. *Redshaw* (who had married *Juliana*) several sums on account of their customary shares.

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Thomas Greenhill died, and Mr. *Duck* having took out administration to him, a bill was exhibited against Mr. *Duck*, Mr. *Chandler*, and the infants, by *Redshaw* for an account of the personal estate, and to have a distribution thereof according to the custom and the will.

May 18, 1707, the cause was heard, and an account directed, and the master by his report charged the defendant *Duck* (who was become insolvent) with 163*l.* 1*s.* 10*d.* as the balance of his account not answered by him, and with 279*l.* 19*s.* received by *Thomas Greenhill* out of the testator's personal estate not answered by him, making together 443*l.* 10*d.* And the master reported, that that 443*l.* 10*d.* ought to be paid to the defendant in right of his wife *Hannah* (who survived both her brothers, *Joseph* and *William*, and was intitled to their shares out of the testamentary part) but if it was lost, it ought to be born out of the testamentary part, and not out of the customary parts. To which report the defendant *Brasier* took exceptions, which coming to be argued the 15th of *December* 1714. before the lord chancellor, the question arose, upon what part of the testator's estate the loss of this money (in case it should not be recovered) was to fall; whereupon it was ordered, that the said master should state a case touching the said loss, and send it to the recorder of the city, to certify to the court the custom of the city of *London* upon the case so to be stated, viz. whether by the said custom the loss of the said freeman's estate by the insolvency of his executors ought to be born out of the testamentary part of his estate only, or out of the whole personal estate, as well customary as testamentary.

The master stated the case as before, and sent it to the recorder. And the lord mayor, aldermen, and recorder, sent a certificate to the court subscribed by them, which after a recital of the case stated by the master was as follows :

" We the lord mayor and aldermen of the said city of
" *London*, whose names are subscribed, do in obedience to
" the said order, by *William Thompson* esquire, recorder
" of the said city, ore tenus humbly certify unto your
" lordship, that if a freeman of *London* dies, leaving a
" widow and children, his personal estate (after his debts
" paid, and the customary allowance for his funeral, and
" for the widow's chamber being first deducted thereout)
" is by the custom of the said city to be divided into three
" equal

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“ equal parts, and disposed of as follows. viz. one third
“ part thereof belongs to his widow, another third part
“ belongs to his children unadvanced by him in his life-
“ time, and the other third part such freeman by his last
“ will may devise as he pleases.

“ But where a loss of a freeman's estate by the insol-
“ vency of his executors doth happen, there is not any
“ custom of the city of *London*, which directs, whether
“ such loss ought to be born out of the testamentary part
“ of his estate only, or out of his whole personal estate, as
“ well customary as testamentary. Dated the 26th day of
“ *April 1715.*” and subscribed by Sir *William Humphreys*
lord mayor, Sir *William Thompson* the recorder, and fifteen
aldermen.

The cause coming on in the paper this day, the certi-
ficate being read, it appeared, no aid for the determination
of this case was to be had from the custom, and no case
being stated as a precedent, where this matter had been de-
termined, it stood for the opinion of the court upon the
reason of the thing. And after hearing the counsel on
both sides, the lord chancellor *Cowper* held, that the loss
was to be born wholly out of the testamentary part, since
it proceeded from the insolvency of the executor, who was
appointed by the testator and in the nature of his trustee,
for whose defaults it was juster that his legatees, &c. should
suffer, than the persons who claimed a right by the custom,
and not under the testator. Sir *Thomas Powys* and Mr.
Cowper counsel for the plaintiffs. Sir *R. Raymond* only
counsel for the defendants; Sir *Joseph Jekyll* and Mr. *Kel-
elbey*, who were the defendants, other counsel being absent.

Hilary Term

10 Georgii Regis, B. R. 1723.

Memorandum, That Sir Robert Raymond, and Edmund Probyn of the Middle Temple, esq. appeared in chancery, Friday the 31st day of January 1723, in obedience to writs directed to them, returnable immediate, commanding them to take upon them the degree of serjeants at law: and they took the usual oaths there, and immediately after were coifed in the treasury of the common pleas, and being brought to the bar counted in that court; and after having entertained the lord chancellor, judges, and serjeants, at dinner at Serjeants Inn hall in Fleet-street, Sir Robert Raymond was that evening sworn one of the justices of the court of king's bench at the lord chancellor's house in Lincoln's Inn Fields, in the room of Sir Robert Eyre, who in the Michaelmas vacation before had been made lord chief baron of the exchequer in the room of the late lord chief baron Mountague, who died in Michaelmas term. The same time Sir Philip York his majesty's solicitor general was sworn attorney general in Sir Robert Raymond's place, and Sir Clement Wearg within a few days succeeded Sir Philip York in the office of his majesty's solicitor general: and Sir Robert Raymond took his place as one of the judges of the king's bench, Monday, February the 3^d, 1723. The motto of our rings was, *Salva ——— Libertate potens.* Lucan.

The inhabitants of the parish of St. Giles in Reading, *against* the inhabitants of the parish of Eversley Blackwater.

Monday, February 3, 1732.

S. C. 2 Sess. Ca. 116, pl. 112.

A legitimate child obtains a settlement by birth in the place in which it is born, if its parents have no settlement. S. C. 1 Sess. Ca. 116, pl. 18. R. acc. fol. 265, 267. ante 567. and see the books there cited. 1 Sess. Ca. 112, pl. 105. But if the father had a settlement when the child was born, the child will be settled by parentage in the parish to which its father belongs, altho' the father resided elsewhere at the time of the birth, and for the whole of his life afterwards. S. C. (a) Str. 580. 8 Mod. 169. Fort. 320. Vide Burn Poor. settlement with the parents. 3 Fol. 269.

A child who acquires a settlement by parentage, may be removed to the place of such settlement after the death of the parent from whom he derived such settlement,

tho' he was never there in the parent's life time. S. C. Str. 580. 8 Mod. 169. Fort. 320. cit. Andr. 350. Vide Burn. Poor. settlement with the parents. 3.

(a) According to the report in Strange 580. Raymond J. dissented from the rest of the court, but according to 8 Mod. 169. 2 Sess. Ca. 116, pl. 112. the whole court was unanimous.

A. Having gained a settlement in the parish of *Eversley Blackwater* removed into the parish of *St. Giles in Reading*, and married there, had two children born there, and lived there till his death; but gained no new settlement in that parish. After the death of *A.* the children were removed by order of two justices to *Eversley Blackwater*, the place of their father's last legal settlement. And upon an appeal to the quarter-sessions from this order of the two justices, this order, by an order of the sessions, which stated the case specially, was quashed, the justices of peace at the quarter-sessions being of opinion, that the children could not be removed to *Eversley Blackwater* after their father's death, he never having been in that parish after they were born, and having lived with his children always in the parish of *St. Giles*. These orders being removed into the king's bench by *certiorari*, Mr. *Raeve* for supporting the order of sessions insisted that the place of the birth of the children in this case was the place of their settlement, *Salk.* 528. *Inhabitants of Comner v. Milton*. And that it was adjudged *Pasch.* 12 *Will.* 3. *B. R.* between the parishes of *Spittlefields* and *St. Andrew Holborn*, ante 567. that a poor child must be maintained by the parish where it is born, if it have gained no other settlement, and its parents have no settlement: 2 *Bulstr.* 351. But it was held by *Pratt* chief justice, *Powys*, *Fortescue*, and *Raymond* justices, that though the place of the birth of a poor child, where the father has got no settlement, is the place of the settlement of the child; yet where the father has gained a settlement, his children, though born in another parish, shall be looked on as settled at the place of their father's last legal settlement, and shall be removed thither, as well after the death of their father, if occasion requires, as in his lifetime, supposing they have gained no settlement of their own. And therefore the order of the quarter-sessions was quashed.

Elde qui tam *vers.* Stephens.

February 4, 1723.

IN debt, *qui tam*, &c. brought by the plaintiff against the defendant [for exercising the trade of a mercer in the corporation of *Offulsry* contrary to the 5 *E. c.* 4. verdict was given for the defendant, and a rule was made, that the plaintiff the informer should pay the defendant's costs on the 18 *El. c.* 5. *f.* 3. Mr. serjeant *Darnall* moved to discharge the rule, because he alledged, that this suit was commenced for the benefit of the corporation, and therefore the statute of 18 *El. c.* 5. did not extend to this case: because by *f.* 6. it is provided that that act shall not restrain any certain person, body politick or corporate, to whom, or to whose use, any forfeiture, penalty, &c. is, or shall be specially limited or granted by virtue of any statute, &c. And by the statute of 5 *El. c.* 4. *f.* 45. all forfeitures for exercising trades in a corporation, contrary to that statute, are given to the use of the corporation. And he offered to produce an *affidavit*, that this suit was for the benefit of the corporation; and if so, this case was not within the statute of 18 *E. c.* 5. for that extends only to common informers. 2 *Leon.* 116. *Doghead's case*, *Cro. Eliz.* 434. *Johnson v. Pays.* But it was held by all the judges, that the court could not receive any information of this matter by *affidavit*, nor take notice of any thing but what appeared on the face of the record; and therefore could look upon the plaintiff only as a common informer, and by consequence he ought to pay costs: for which reason the motion was denied. But see *Hob.* 183. *Moore* 886. *pl.* 1245. and *quaere*, whether the 5 *El. c.* 4. *f.* 45. gives the main penalty (as *Hobart* expresses it) for using a trade in a corporation contrary to that act to the corporation; and if it does, if a common informer can maintain a suit for it? Note, that matter was not stirred in this case by the counsel, nor taken notice of by the court on the motion, nor was it material in the present question before the court.

An affidavit that a suit is brought for the benefit of an other person than the plaintiff is not to be received. Vide 1 *F. R.* 610. 1 *Will.* 233. 2 *Will.* 266.

Q. Whether the penalty for exercising a trade in a corporation contrary to the 5th of *Eliz. c.* 4. is given by that statute to the corporation.

If it is, Q. Whether a common informer can sue for it. Vide 1 *Will.* 233. 2 *Will.* 226.

The King *against* Johnson.

S. C. Str. 579.

A *Habeas corpus* was granted, directed to the defendant, to bring up the body of a child about (a) ten years of age, which she had in her custody. To which she returned, that she was appointed guardian to the child by the spiritual court, and therefore kept her in her custody. But the person, who sued out the *habeas corpus*, insisted, he was appointed guardian to the girl by her father's will. The child was very unwilling to be taken from the care of Mrs.

A child of ten years old shall on a *habeas corpus* be taken out of the custody of a guardian appointed by the spiritual court, and deliver her to one appointed by her father's will. Sed Vide 3 *P. Wms.* 151.

(a) According to Str. 579. she was only 9. According to Burr. 1436. only 6.

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Johnson, who was her near relation, and had taken great care of her, and was to have no benefit by keeping her. And the court doubted, whether they should deliver the child to the guardian appointed by the father's will, or only set her at liberty out of Mrs. *Johnson*'s custody, and leave her to go to whom she pleased. Whereupon the court ordered Mrs. *Johnson* to bring up the child against the last day of the term, at which time also the guardian, who was then in the country, was directed to attend; at which day the child was (a) delivered by the court to the guardian appointed by the father's will.

(a) According to the report in Str. 579. the only reason why the court delivered the child to her testamentary guardian was because she was too young to judge for herself: and this is considered as the right ground of the decision, Burr. 1436. Vide Str. 444. 982.

The King against the chancellor, masters, and scholars of the university of Cambridge.

S. C. Fort. 202. with the first argument, Str. 557. 3 Mod. 148.

A mandamus lies to restore a man to any academical degree to which temporal advantages are annexed. Vide 1 Str. 393.

*Tis a sufficient return to such a mandamus that there is a visitor to whom the party who has obtained the mandamus may apply.

All inferior courts are prima facie to be supposed to proceed according to the common law.

An officer cannot by the common law be suspended or degraded from his office unless he is either summoned to make a defence, or actually makes one. Vide ante 225. and the books there cited. 1233.

An officer illegally suspended or degraded shall be restored by mandamus unless it appears that he may have redress by applying to some other court. Notwithstanding a clause in a charter confirmed by act of parliament quod nullus iudex de placitis tenendis by the charter in an inferior court se intromittat, nec partem ad respondendum coram se ponat, sed quod parilla coram the inferior court justificaretur & puniretur, & non alibi nec alio modo. The king's bench may inquire into the legality of the suspension of a man within the jurisdiction from certain temporal offices there.

Q. Whether, a contempt of a court is a reasonable ground for suspending a man from an office.

Q. Whether if it is stated in the return to a mandamus that a man exhibited depositions to a court, it is to be presumed those depositions were on oath.

A Mandamus was directed to the chancellor, masters and scholars of the university of Cambridge, commanding them to restore *Richard Bentley* to the academical degrees in that university of bachelor of arts, master of arts, bachelor of divinity, and doctor of divinity, &c. To which the defendants returned, that the university of Cambridge is, and time out of mind has been, a body corporate, consisting of a chancellor, masters and scholars of the same university: that the said chancellor, masters and scholars have, and time out of mind have had, the care, government and correction of the said university, and of all scholars, students, and others, upon the account of their studies residing in the said university; and for all the time aforesaid used to confer certain academical degrees or titles, viz. as well those degrees in the said writ mentioned, as degrees of the like nature in divers other faculties or sciences, *et ab eisdem gradibus sine titulis susceptis iterum pro rationabilibus causis suspendere amovere aut excludere quandocunque visum fuerit necessarium seu expediens*: that time out of mind there has been within the said university quaedam curia tenta coram cancellario ejusdem universitatis aut procancellario universitatis praedictae vel locum tenente eorumdem cancellarii magistrorum et scholarium universitatis praedictae

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pro cognitione triatione et determinatione omnium placitorum personalium, tam debitorum computorum et quorumcunque aliorum contractuum quam transgressionum contra pacem et misprisionum quarumcunque, infra villam Cantabrigiae et suburbia ejusdem villae factarum (mayhem and felony only excepted) ubi magister vel scholaris vel serviens scholaris aut communis magister dictae universitatis una partium fuerit ubicunque infra villam praedictam aut suburbia ejusdem secundum leges et consuetudines universitatis praedictae: that queen Elizabeth by her letters patent, dated 26 April, third of her reign, granted for herself, &c. to the said chancellor, masters and scholars of the said university, quod ipsi et eorum loca tenentes for the time being, coram seipsis should have consufance of all pleas personal, as well of debts, &c. (as laid before in the prescription) and that all such pleas the chancellor, masters and scholars et eorum loca tenentes might hear, hold and finally determine ubicunque infra villam aut suburbia ejusdem villae placuerit, et inde executionem facere secundum leges et consuetudines suas ante tunc usitatas; and that the said court should be a court of record; and of such actions, &c. tam ex officio quam ad seclam partis secundum leges et consuetudines praedictas inquirerent et finaliter determinarent eisdem modo et forma prout ante tempus illud usi fuerunt; et quod tam justiciarii ad placita coram ipsa regina et successoribus suis tenenda assignati et assignandi, justiciarii dictae dominae reginae haeredum et successorum suorum de banco, quam alii iudices quicunque in praesentia et absentia dictae reginae haeredum et successorum suorum dicto cancellario et ejus successoribus eorumque loca tenentibus de omnibus placitis praedictis allocationem facerent absque difficultate vel impedimento aliquali; et quod nullus justiciarius seu iudex in praesentia vel absentia dictae reginae haeredum seu successorum suorum, vicecomes major ballivus seu aliquis minister de placitis illis seu aliquo eorundem se intromitteret, nec partem ad respondendum coram ipsis poneret, sed quod pars illa coram praefatis cancellariis seu eorum loca tenentibus inde solummodo justificaretur et puniretur in forma praedicta et non alibi neque alio modo; et quod omnia brevia super hujusmodi placitis et transgressionibus contra istam concessionem facta seu fienda forent ipso jure nulla: that by an act of parliament held 2 April 13 Eliz. intituled, An act concerning the several corporations of the universities of Oxford and Cambridge, and the confirmation of the charters, liberties and privileges granted to either of them, it was enacted, that letters patent granted by Henry VIII. to the chancellor and scholars of the university of Oxford, and the said letters patent of the said queen granted to the chancellor, masters and scholars of the university of Cambridge, and all other letters patent granted by any of the queen's predecessors to either of the universities, extunc forent bonae effectuales et pleni vigoris in lege to either university secundum formam verba clausulas et veram intentionem of the said letters patent, as if they had been verbatim recited
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Plaint levied by
Dr. Middleton at
the vice-chan-
cellor's court 23
Sept. 1718.
against Dr. Bent-
ley.

Process granted
and directed to
the esquire bedel.

Service of process
on Dr. Bentley.

Dr. Bentley's
contempt of the
process.

At a court held
3 Oct. Dr.
Middleton de-
clared.

in the said act; and that all the said letters patent, and all liberties, franchises, privileges, &c. by the said letters patent, should by virtue of the said act of parliament be ratified and confirmed to the said several universities: that at a court held 23 Sep. 1718. before Dr. Gooch vice-chancellor of the said university of Cambridge *nechon locum tenente* of the chancellor, masters and scholars of the said university, held within the town of Cambridge *secundum consuetudinem infra universitatem praedictam* time out of mind used, *et juxta libertates et privilegia* to the said chancellor, masters and scholars before granted, Dr. Conyers Middleton, then being one of the masters of the said university, and within the said university residing, levied a plaint in debt for 4l. 6s. against Richard Bentley in the writ named, one of the said masters, and within the said university then residing, according to the custom of the said court and of the said university time out of mind used, for a debt and cause of action within the jurisdiction of the said court contracted or arising, and thereupon the said Dr. Middleton then and there prayed process against the said Richard Bentley according to the custom of the university and court aforesaid all the time aforesaid used, *super quo ad petitionem* of the said Dr. Middleton *taliter in eadem processum fuit quod quoddam decretum sive processum extra curiam praedictam bedello armigero universitatis praedictae et ministro curiae illius directum*, to compel the said Richard Bentley to appear at the then next court to be held before the vice-chancellor *ac locum tenente* of the chancellor, masters and scholars of the said university, *emanavit secundum consuetudinem curiae praedictae*, which decree afterwards and before the return thereof, *viz.* the said 23 Sept. 1718. was delivered to Edward Clark, one of the esquire bedels and officers of that court then being, to be executed in due form of law, which said Edward Clark afterwards, *viz.* the said 23 Sept. *secundum exigentiam decreti praedicti* at Trinity college within the jurisdiction of the said court *ad ipsum Ricardum accessit et praedictum decretum sive processum ei ostendit et inserivit, et superinde idem Ricardus Bentley* the said 23 Sept. *infra jurisdictionem curiae illius adtunc et ibidem colloquium habens cum praefato Edwardo Clark de et concernens decretum sive processum praedictum et de et concernens praefatum Thomam Gooch judicem illum adtunc existentem, contumeliose dixit et prepalavit, quod processus ille fuit statutis minime congruus, Anglica unstatutable, quodque ipse noluit illi obedire et decretum sive processum illum e manibus ipsius Edwardi Clark adtunc et ibidem abstulit, et adtunc et ibidem affirmavit, quod praedictus procancellarius non fuit ipsius judex, et quod praedictus procancellarius stulte egit, et alia verba contumeliosa de eodem protulit:* that at the then next court before the said vice-chancellor, &c. within the said town of Cambridge, &c. held 3 Oct. 1718. *secundum consuetudinem ejusdem universitatis et curiae et juxta libertates et privilegia praedicta*, the said Dr. Middleton appeared,

appeared, and declared against *Richard Bentley* upon the said plaint, that he was indebted to *Middleton* in 4*l.* 6*s.* and named his proctor: and at the said court *Robert Grove* then register and minister of the said court exhibuit depositiones of the said *Edward Clark* bedel and minister of the said court of the contempt aforesaid, quibus depositionibus adtunc et ibidem lectis, ad eandem curiam per considerationem ejusdem curiae ad petitionem of the said proctor, and with the assent of six doctors (naming them) eidem procancellario adtunc assidentium, the said *Richard Bentley* secundum consuetudinem curiae et universitatis praedictarum a toto tempore praedicto usitatam et approbatam pro contemptu illo suspensus fuit ab omni gradu suscepto, et per eandem curiam adtunc et ibidem pronuntiatus fuit esse sic suspensus: that there is, and time out of mind has been, a custom within the said university, that the chancellor or vice-chancellor of the said university vel ejus locumtenens quandam congregationem consistentem de eodem cancellario aut procancellario vel ejus locumtenente et magistris regentibus et non regentibus infra universitatem Cantabrigiae praedictam residentibus infra limites ejusdem universitatis summonere et convocare poterit quandocunque placuerit; and that the congregation so summoned and convened quolibet gradus academicos per eandem universitatem secundum consuetudines ejusdem universitatis concessos ab aliqua persona infra universitatem illam residente propter contumaciam talis personae aut aliam justam et rationabilem causam prout eis visum fuerit expediens auferre, et eosdem gradus aut eorum aliquos eidem personae supra suam purgationem aut summisionem restituere de tempore in tempus secundum suam discretionem poterit et per totum tempus praedictum usa fuit et consuevit: that at a congregation of the said university according to the custom by the said *Dr. Thomas Gooch* vice-chancellor, &c. summoned and convened the seventeenth of October 1718, within the said university and town held, the said vice-chancellor narravit praedictis magistris sic convocatis et conventis contemptum praedictum, et eorum judicium de praemissis, petiit, super quo visis et intellectis actibus et recordis curiae praedictae, necnon lectis et auditis depositionibus praedictis, quaedam gratia sive placitum de eodem *Ricardo Bentley* proposita fuit secundum consuetudines infra universitatem praedictam in ea parte a toto tempore supradicto usitata in his verbis: Cum reverendus vir *Ricardus Bentley* collegii Trinitatis magister ad summos in hac universitate titulos et honores vestra favore dudum promotus adeo se immemorem et loci sui et vestrae auctoritatis dederit, ut d. bite summonitus ad comparandum et respondendum in causa coram procancellario obedientiam recusaverit, ministrum universitatis summonentem indignis modis tractavit, procancellarium et capita collegiorum opprobriis impetiverit, jurisdictionem denique universitatis longo usu regis chartis et auctoritate parlamenti stabilitam pro nibilo habendam esse

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The register exhibited the depositions of the bedel of the contempt. Judgment by the said court, that *Dr. Bentley* should be suspended from all degrees.

Custom to hold a congregation.

Custom for the congregation to deprive for contumacy, &c.

and to restore.

Congregation held 17 Octob. 1718.

Grace put up.

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Dr. Bentley
deprived of all
degrees.

esse declaraverit; cumque idem Ricardus Bentley super his causis ab omni gradu suspensus fuerit, et postea per tres dies juridicos expectatus comparere tamen neglexerit: placeat vobis, ut dictus Ricardus Bentley ab omni gradu titulo et jure in hac universitate dejiciatur et excludatur: et superinde idem Ricardus Bentley per sententiam et congregationem secundum consuetudines universitatis praedictae a toto tempore praedicto usitatus ab omni gradu titulo et jure in eadem universitate dejectus et exclusus fuit: quodque idem Ricardus Bentley auctoritati ejusdem universitatis se submittere neglexerit et recusaverit, et hucusque neglexit et recusavit: et his de causis praefatum Ricardum Bentley ad gradus academicos in brevi praedicto mentionatos non restituimus, et eum sic in contemptu remanentem restituere vel restitui facere salva auctoritate academica non possumus.

A. Snape procan.

Privileges of
graduates in the
universities.

Last Trinity term this case was argued by Mr. serjeant Cheshyre for Dr. Bentley, and by Mr. serjeant Comyns for the university; and at that time the whole court, viz. Pratt chief justice, Powys, Eyre, and Fortescue, justices, were strong of opinion, that the return was ill, and that a peremptory mandamus ought to issue; having before resolved, that a mandamus would well lie in this case, because these degrees in the university were to be looked on as more than bare titles of honour, or precedency, several temporal advantages being annexed to them by acts of parliament. And this term the merits of the return were argued by Mr. Reeve for Dr. Bentley, and Mr. Attorney General Yorke for the university. Mr. Reeve for Dr. Bentley admitted, that if the university had returned, that the king was their visitor, as they might have done, it would have put an end to the dispute here; but not having returned, that they had a visitor, if it appears by the return that the proceedings in the university have not been agreeable to the rules of justice, a peremptory mandamus ought to issue. He insisted, when degrees in the university were conferred upon a person, he had thereby a freehold in them, and would be intitled to several privileges and advantages annexed to them by acts of parliament, of which this court must take notice. By 21 H. 8. c. 13. s. 23. doctors in divinity, batchelors in divinity, &c. may purchase and take dispensations to hold two benefices with cure of souls, &c. By 13 E. c. 12. s. 6. a batchelor of divinity may be admitted to a benefice of above 30*l.* per annum in the queen's books. Incumbents of churches in cities and towns corporate united pursuant to 17 Car. 2. c. 3. s. 6. must be graduates of one of the universities in this kingdom. And graduates in the universities are intitled to several privileges by the canons of 1603. Canon 41. 127.

In

Hilary Term 10 Georgii regis.

In this return the university rely on two things :

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1. A suspension of Dr. Bentley from his degrees by the vice-chancellor's court.

2. A deprivation of them by the convocation.

As to the suspension, he insisted it was not legal. For the support of it he said, the university rely :

1. On a custom:

2. The letters patent of queen Elizabeth, in which there is that clause, *Quod nullus justiciarius seu judex se intromittat*, &c.

3. The act of 13 Eliz. confirming the said letters patent, and the liberties and franchises of the university.

And he would first consider that clause of *nullus justiciarius seu judex se intromittat*, &c. because it was strongly urged for the university that by that clause this court was excluded from all jurisdiction of inquiring into their proceedings in this case. But he said, this was no more than a grant of conu-
sance of pleas exclusive of other courts and must be governed by the rules the law has provided relating to such sort of grants, by which the courts above are not deprived absolutely of jurisdiction. For if an action is commenced in this court against a scholar of the university, the university may claim conu-
sance of the plea by virtue of these letters patent, and the act of parliament; and if they make their claim properly, and in time, it must be allowed, and the proceedings here will be stopped. But if the university does not make their claim the first day, this (a) court will proceed notwithstanding this grant. And so was it held *H. 11 Ann. B. R. Perne v. Manners*, 10 Mod. 25. *Fost.* 155. where case was brought against the defendant, a member of the university, inhabiting within their jurisdiction. The bill was of *Eastex* term 11 Ann. and the defendant had an imparlance till the first day of *Trinity* term following; after which, and before plea pleaded, the university of *Cambridge* by their attorney demanded conu-
sance, and set out the letters patent, and act of parliament of queen Elizabeth before mentioned; and the claim was allowed, because it was not made the first day. And it was then held by the court, that as to the grantee of the franchise, there was no difference as to the claim between a grant of a general conu-
sance, and a grant of conu-
sance with exclusive words; and on a grant of general conu-
sance

A grant of hold-
ing plea, &c.
with a clause,
nullus judex se
intromittat, &c.
is but a grant of
exclusive conu-
sance.

(a) R. acc. 1.
Sid. 203. 1 Lev.
89. Burr. 2820.
Vide 2 Wils.
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(a) D. acc. ante
§36.

(b) D. acc. ante
§37.

the claim must be before imparlance. Conusance cannot be demanded after the tenant has made default. *Mich. 3 Hen. 6, 10.* That conusance cannot be demanded after an imparlance. *Mich. 6 Hen. 7, 9.* Then they held, that the act of parliament made no difference, because that confirmed this franchise only as it was granted, viz. a grant of exclusive conusance; but the claim of it must be according to the rules of law. Indeed in that case it was held, there was this difference as to the defendant in the action between a grant of a general conusance, and of an exclusive conusance; the first the (a) defendant cannot plead to the jurisdiction of the court, the last if he comes in time he (b) may; from which case it appears, the court looked upon this grant only as a grant of an exclusive conusance, and that the act of parliament only confirmed it as such, and put it upon the same foot as such grants stood in law in cases of grants of exclusive conusance, and that this court is not thereby excluded from examining into their proceedings.

He admitted, that the facts set out in the return were contempts to the vice-chancellor's court, which they might have punished, if they proceeded according to the rules of law. He said, that court was a court of record, and therefore might have set a fine, and imprisoned the party till it was paid, which is a proper punishment for a contempt; but that suspension is not a proper punishment for a contempt. A corporation could not suspend a member of their body for a contempt to one of their courts. And if they had returned a custom to suspend for a contempt, it would have been an unreasonable custom, and void. But here no such custom is returned, but only that they suspended *Richardum Bentley secundum consuetudinem curiae*, which is not sufficient; for the custom, if any such, ought to have been returned particularly. Besides, they must have some other way to punish contempts to the vice-chancellor's court; for if a person, that is not a graduate in the university, should commit a contempt to that court, certainly they have a way to punish him; but that could not be by suspending him from any degrees, because he has none.

In the next place he said, that as it stands upon this return, the contempt was not sufficiently made to appear to the vice-chancellor's court. For it is alleged, that *Robert Grove* the register *exhibuit depositiones dicti Edwardi Clark, bedelli et ministri curiae, ut praefertur, de contemptu praedicto*, which depositions being then and there read, per considerationem ejusdem curiae the said *Richard Bentley* was suspended, &c.

1. It is not alleged, these depositions were upon oath, and the word depositions does not import *ex vi termini*, that they were upon oath. 3 Inst. 167. Latch. 133. If in case of an indictment it should be *juratores deponunt*, it would be ill.

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2. It ought to appear, before whom the oath was taken, and that he had an authority to administer the oath.

3. It is said *depositiones de contemptu*; now possibly the depositions might clear the doctor of the contempt, for it is not said, the depositions made out the contempt.

He insisted, that the return to this *mandamus* ought to be as certain as a conviction, that the court may judge upon it; because the party has no way to answer it, but by falsifying the facts returned, in an action for a false return; and in this case, if an action was brought to falsify the return as to that part relating to the depositions, if it should appear on the trial, the depositions were not upon oath, yet the plaintiff could not recover, because they are not alleged so to be in the return; and yet if they were not upon oath, the vice-chancellor's court should not have proceeded upon them.

But supposing these things should be looked upon to be sufficiently alleged; yet the suspension by the vice-chancellor's court is void, because it is set out in the return, that the chancellor, masters and scholars used to confer degrees, and to suspend them, and remove persons from them; so that the power of suspending degrees is in the whole body, but here the suspension was by the vice-chancellor's court, which is not the whole body, and that court has no power to suspend. For which reasons the suspension by the vice-chancellor's court must fall to the ground.

2. As to depriving Dr. Bentley of his degrees by the congregation, Mr. Reeve insisted, the proceedings were arbitrary and illegal. The custom is returned, that the congregation have time out of mind used to deprive any person residing within the university of any academical degrees conferred by the said university, *propter contumaciam talis personae, vel aliam justam et rationabilem causam*.

1. He said, that the return had not brought Dr. Bentley within their jurisdiction, as the custom is laid; for it is not averred, that he resided within the university.

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2. It is not laid in the custom, to what court, or to whom, the person to be degraded is to be guilty of contumacy.

3. Though it is said, they may degrade for other reasonable cause; yet here no reasonable cause appears, for it cannot be a reasonable cause for the congregation to degrade for a contempt or contumacy to another court; and it is not said he was guilty of contumacy to the congregation.

4. It came very oddly before the congregation, for it did not come by way of appeal, but the vice-chancellor *narravit*, &c.

But he relied upon it, that there was a fatal fault in the return, which could not be answered; which was, that it did not appear, the doctor was summoned, or had notice of these proceedings against him, so that he had no opportunity to make his defence. And to condemn a person, without hearing him, or giving him an opportunity of defending himself, was contrary to natural justice; and such proceedings have been always held illegal and void by this court. 9 *Ed. 4*, 14. *a.* 11 *Co.* 99. *Ja. Bagg's case*. 1 *Sid.* 14. 2 *Sid.* 97. *Rex v. Champion*. 4 *Mod.* 37. *Glidd's case*. And so it was held in serjeant *Whitaker's case*, ante 1233, when he was removed from being recorder of *Isfwich*, to be restored to which he brought his *mandamus*.

S. R. cannot take notice, the university courts proceed according to the rules of the civil law.

That it is no objection, to say the university courts proceed according to the rules of the civil law; for that not being alleged in the return, this court can take no notice of it: and saying these things were done *secundum consuetudinem*, is nothing, for the custom ought to be specially set out in the return. For which reasons he insisted, the matter in the return did not excuse the disobedience of the writ, and therefore he prayed a peremptory *mandamus* might issue.

Mr. attorney-general *Yorke contra* argued for the university. He said, as to the point of want of summons, he did admit, unless this case could be distinguished from the cases of members of corporations, it would be against the university. The case, he said, was of great consequence, because the franchises and privileges of the university were concerned on one hand, and the rights and liberties of the members thereof on the other.

Two things must be took for granted:

1. That every fact well laid in the return must be took to be true.

2. That

2. That it would be no objection against the proceedings of the university, that they were contrary to the rules of the common law, provided they were warranted by their customs and charter confirmed by act of parliament.

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That there were two general questions in this case.

1. If a writ of *mandamus* lay, to restore Dr. Bentley to his academical degrees?

2. If the cause of depriving the doctor of them, set out in the return, is sufficient, and the return good?

As to the first, the court having already determined, the writ was good, and well lay, he would acquiesce under that determination.

But as the other side had agreed, that if the university had returned a visitor, it would have put an end to this *mandamus*; so he could not but observe, that if there was a visitor, if the doctor was aggrieved by these proceedings in the university, he might have made his application there.

As to the second, the return consists of two parts:

1. The suspension by the vice-chancellor's court.
2. The degradation by the congregation.

If either of them is sufficiently justified, the return will be good, and no peremptory *mandamus* ought to go.

First he said, he would consider the validity of the suspension. As to the objections to the form, they would receive plain answers; but as to the objection, that Dr. Bentley was not heard against the contempt in the vice-chancellor's court, and that it was against natural justice, a man should be condemned, without being heard; he answered, that it must be admitted, there was no necessity, that Dr. Bentley should be actually heard; but if he had an opportunity to be heard, that would be sufficient. Now he had an opportunity to be heard, for he was served with process to appear at the next court, and if he had paid obedience to that process, he had heard the charge against him, to which he might have been heard.

That there was no necessity to issue out a summons, or to give him new notice, to come and answer the contempt;

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If A. is charged by affidavit with a contempt to the court, as speaking reflecting words saying he will not obey the process, or beating the officer, an attachment will go, without giving him a day to be heard. Vide Say. 47, 114.

Proceeding in vice-chancellor's court according to civil law.

for if a person commits a contempt to this court, or the court of chancery, by declaring he will not obey the process of the court, by beating an officer executing the process of the courts, or by speaking reflecting or contemptuous words of any of the judges; upon an affidavit made of the fact, he will be committed, without hearing him; for it is looked on to be a vain thing, when he has committed a contempt before, to make a rule of court, to give an opportunity of committing a new contempt against it. This is the rule in this court, and in chancery; and it is also the rule in the canon and civil laws. And that is very considerable in this case, because the proceeding of the vice-chancellor's court is according to those laws. In the civil law there is a distinction between *contumaciam presumptivam* and *contumaciam manifestam*. Calvin Lexicon, *Contumacia. Alciati Praxis*, fol. 92, 93, 99. *Contra contumacem potest procedi absque ulla nova citatione. Mensingerius Observ. ad idem. Decret. L. 2. tit. 6. or 96. de Contumaci.* The proceedings in the vice-chancellor's court being according to the rules of the civil law, though this court should examine them, yet they must be examined according to the rules of that law.

The crown cannot authorise a court to proceed by any other than the common law. acc. 10 Mod. 125, 126.

The cause of suit was within the jurisdiction of the vice-chancellor's court, and this was a contempt in that cause; and if that court had a jurisdiction, all the objections as to the irregularity of the proceedings will be out of the case. Their proceedings are confirmed by queen Elizabeth by her letters patent, as far as she could do it; but the crown cannot erect a court to proceed according to the civil law by charter, therefore an act of parliament was necessary: an act accordingly passed, to confirm the letters patent, in which the exclusive words are exceeding strong, as well as the confirmation of all their liberties, privileges, &c. That their proceedings are according to the civil law, Hale chief justice in his *History of the Law* takes notice, 33, 34 Mich. 8 H. 4. rot. 42. And in the case of *Manners and Perne*, Hil. 1 Ann. B. R. it was insisted on in the argument of that case, and not denied, that their proceedings were by the civil law. Besides, every fact alleged to be done in the return is said so to be, *secundum consuetudinem*, &c. of the university; and so is the suspension alleged to be.

In inferior courts it is enough to say, *secundum consuetudinem curiae*.

But it has been objected, that it is not enough to say, Dr. Bentley was suspended, &c. *secundum consuetudinem*, &c. but there ought to be a custom particularly set out for that purpose. To which he answered, that in proceedings in inferior courts it is always allowed, to say they were *secundum consuetudinem curiae*.

As to the objection, that suspension from the academical degrees is not a proper punishment for a contempt to a court; he answered, that by the rules of the civil law it is the only proper punishment. And it is like an outlawry in the temporal courts, it is to compel the party to come in and answer; and upon his doing that, the suspension is took off. And these degrees cannot properly be called freeholds, nor civil temporal rights; they were originally only in nature of licences to professors in several professorships, and are now titles of distinction and precedence. The power of granting degrees flows from the crown. If the crown erects an university, the power of conferring degrees is incident to the grant. Some old degrees the university have abrogated, some new they have erected; and they are took notice of in acts of parliament for collateral purposes; and though the acts have annexed collateral privileges to them, that will not alter the nature of them, nor take away the power the university had over them before; no more than if it should be enacted by an act of parliament, that none but such as were educated at *Eton*, *Westminster*, or *Winchester*, should be capable of degrees, would it restrain the university from exercising the power they have over degrees, upon such persons educated at those schools, upon whom they should be conferred. It does not follow, that if temporal rights are annexed to these degrees, the university would be deprived of their power of degrading. A bishop has a freehold in his bishoprick, and a right to sit and vote in parliament; yet he may be deprived by his metropolitan. Bishop of *St. David's* v. *Lucy*, ante 447. the ecclesiastical court may excommunicate for a contempt, and that affects the party's temporal rights of suing, &c. This punishment by suspension does not differ in reason from those cases. Therefore he concluded, this suspension was a proper punishment for the contempt.

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Degrees in the
university.

The establishing, that the vice-chancellor's court had a jurisdiction, lets in the exclusive clauses, and they must take place. It must be admitted in this case, that neither a prohibition, nor a *certiorari*, would have lain in this case. And if they have a jurisdiction, and the exclusive clauses take place, the irregularity of their proceedings cannot be examined in this court on a *mandamus*.

If courts have a jurisdiction and power to proceed by rules different from the common law, this court will not examine into the regularity of their proceedings on a *mandamus*. And therefore if a *mandamus* is granted, to restore a fellow of a college; if they return a visitor, though his sentence has been irregular, it is not examinable here.

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Philips v. Bury, ante 5. So if the ecclesiastical court excommunicates a person without a citation, this court will not grant a prohibition; but the party must appeal. When a prohibition is granted to the vice-chancellor's court for not granting a copy of a libel, it is by reason of the express words of an act of parliament. And if an act of parliament should enact, that no *certiorari* should lie, to remove convictions of justices of peace for such and such offences; though the justice of peace should convict the party without summoning him, no *certiorari* would be granted by this court, to remove such a conviction.

As to the objection, that by this means the vice-chancellor's court would have an uncontrollable jurisdiction without appeal; and that it was unreasonable, a man should be concluded by the first determination; he answered, an appeal lay from the vice-chancellor's court to the congregation. [But note, that does not appear by the return.] However, this depended on a positive law, which was made such by confirming the privileges of the university by the act of parliament.

2. As to the objections against the degradation by the congregation, he said they were,

1. As to the power they had to degrade.

2. As to the manner of their proceedings.

He said, that what had before been urged to support the suspension, might properly be applied to support this degradation, without repetition. But he farther insisted upon it, that the whole proceeding against Dr. *Bentley* ought to be considered as the act of the court of the university. For by the letters patent the grant is to the chancellor, masters, and scholars, that they, *viz.* the chancellor, masters and scholars, which is the whole body of the university, and their *loci tenentes*, should have consueance, &c. and therefore the (a) congregation are to be considered as the judges of the court, and the vice-chancellor only as their official: that the court usually held before the vice-chancellor, might be held before the congregation: that by the civil law, where there is a commissary, he has only part of the jurisdiction, the rest remains in the ordinary, and that the ordinary may proceed upon a report made by his official.

(a) Note, the congregation does not consist of the chancellor, masters, and scholars, which is the whole body; but of the chancellor or vice-chancellor, or his *locum tenens*, et de magistris regentibus et non regentibus, residing within the university. Note to the 1st Edition.

So here, the congregation might proceed upon the report of the vice-chancellor, which in this case he made to them.

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As to the objection, which he said had been made, that if the degradation stood, Dr. *Bentley* would be deprived of his degrees, without ever being heard, without prospect of being restored; he answered, that this was but in nature of a process, to compel Dr. *Bentley* to come in and appear, &c. and that it is the general rule of all courts, and of all laws, that when the party comes and clears his contempt, he shall be restored, &c. *Linw. cap. 18. Contumacia*. That this privilege of suspending degrees, and degrading, was agreeable to the privileges all other universities enjoyed; and that it was necessary, that universities should have such a summary method of proceeding. For which reasons he insisted, the return was good, and that no peremptory *mandamus* ought to issue.

Mr. *Reeve* by way of reply insisted, that though great stress had been laid upon the allegations in the return in its several parts, that the facts were done *secundum consuetudinem*, &c. that was not sufficient to make the return good. For the grant in the letters patent of queen *Elizabeth* is, that the university should hold a court, to hear and determine pleas, &c. *secundum leges et consuetudines suas ante tunc usitatas*: therefore if they have a method of proceeding by the civil law, which has been always used, that ought to have been averred specially; and without it, this court cannot take notice of it under that general allegation, but must intend the proceedings are according to the rules of the common law. It is true, in cases of inferior courts such an allegation is enough, because their proceedings are agreeable to the common law; but if the rules of the common law are to be excluded, such a custom must be specially set out.

And as to the objection, that the vice-chancellor's court is part of the congregation, and that the congregation is held before the whole body; the first is not alleged so to be in the return; and as to the last, the congregation consists of the chancellor or vice-chancellor, or his *locum tenens*, and the regents and non-regents, which is not the whole body of the university.

February 7, 1723. lord chief justice *Pratt* delivered the opinion of the court, viz. of himself, *Powys*, *Fortescue* and *Raymond* justices, that the return was ill; because since it is not shewn in the return, that the proceedings in the vice-chancellor's court or the congregation are according to the rules

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rules of the civil law, they must be intended to be agreeable to the rules of the common law; and if so, it not appearing the party has any redress by applying to another court, this court will relieve him, if he has been proceeded against and degraded, without being heard, which is contrary to natural justice. This case therefore will fall under the rules for the removing of members of corporations, which cannot be done, without summoning the party, and giving him an opportunity of being heard. The cases determined upon that head are so numerous, and the rule so well settled and known, that it cannot now be disputed; for want of doing which, this suspension or degradation cannot be supported. And therefore a peremptory *mandamus* was granted.

Easter Term

10 Georgii regis, B. R. 1724.

Thomas Knight Esq. *against* Richard Cambridge.

S. C. Str. 581. and with some inconsiderable difference. 8 Mod. 237.

Cambridge brought a writ of error upon a judgment given against him in the common pleas, in an action brought by the plaintiff upon a policy of insurance of the ship *Riga Merchant*, at and from *Port Mahone* to *London*. And serjeant *Branthwaite* for the plaintiff in error insisted, that the judgment was erroneous, because the breach was ill assigned: because the policy was, that the defendant *Cambridge* should insure the said ship, among other things, against the barratry of the master, and all other dangers, damages, and misfortunes, which should happen to the prejudice and damage of the said ship; and the breach assigned was, that the ship in the said voyage, *per fraudem et negligentiam magistri navis praedictae depressa et submersa fuit, et totaliter perdit et amissa fuit et nullius valoris devenit*. This, he insisted, was not within the meaning of the word barratry, but the breach should have been express, that the ship was lost by the barratry of the master. Besides the owner of the goods has a remedy against the owners of a ship, for any prejudice he receives by the fraud or neglect of the master; and therefore there is the less reason the insurer should be liable. Besides, if the word barratry should import fraud, yet it does not import neglect; and the fact here alleged is, that the ship was lost by the fraud and neglect of the master. But the court was unanimous of opinion, that there was no occasion to aver the fact in the very words of the policy, but if the fact alleged came within the meaning of the words in the policy it is sufficient. Now barratry imports fraud, *Du Fresne Glossar. verbo barataria, fraud, dolus*. And he that commits a fraud, may properly be said to be guilty of a neglect, *viz.* of his duty. Barratry of a master is not to be confined to the master's running away with the ship: and the general words in the policy ought to be

Error C. B.
Intr. Pasch. 7
Geo. C. B.
Rot. 677.

Fraud and negligence in the master of a ship include barratry, vide Cowp. 143. In an action on a policy of insurance against a loss by barratry in the master of a ship, the plaintiff may state the loss to have been occasioned by the fraud and negligence of the master.

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be construed, to extend to losses of the like nature as those mentioned before: now losses arising from the fraud of the master are of the same nature as if he had run away with the ship, supposing barratry was to be confined to that, which it is not, because it imports any fraud. And judgment was affirmed, *April 27, 1724.*

Philip Wilkinson against Sir Peter Meyer.

S. C. 8 Mod. 232. more at large Str. 585.

Where a statute directs that contracts of a particular description entered into before the making of the statute shall be registered, and that the registry shall express the names of the parties for whose benefit the contracts were made, if it appears from any part of the act that the main object of the direction was to ascertain who had the right of suing on the contracts, 'tis sufficient if the registry expresses who was beneficially interested in the contract at the time of the registry.

Covenant upon an indenture, dated the 19th of *August* 1720. made between the plaintiff of the one part, and the defendant of the other, whereby the plaintiff, in consideration of 1436*l.* 10*s.* to be paid to him as therein after mentioned by the defendant, covenanted for himself, &c. that he, his executors or administrators, should, on or before the 25th of *March* next ensuing, transfer, &c. to the defendant, his executors, administrators and assigns, all such stock, bonds, notes, bills, and money, as the *South-Sea* company should allow, deliver, and pay, to the proprietors of lottery annuities, for 1277*l.* 1*s.* 6*d.* capital stock in the lottery annuities at 5 *per cent.* then already subscribed into the said company by or in the name of the said plaintiff, with all dividends, profits, &c. and the defendant, in consideration of the premises, for himself, &c. covenanted with the plaintiff, that he, &c. should within the time aforesaid accept all the said stock, bonds, &c. which should be given by the *South-Sea* company for the 1277*l.* 1*s.* 6*d.* lottery annuities, &c. and would pay 1436*l.* 10*s.* for the same: and for non-payment of the 1436*l.* 10*s.* the action of covenant was brought. After *oyer* of the indenture, the defendant by leave of the court pleaded four several matters in bar; the last of which was, that neither the contract in the declaration mentioned, nor any abstract or memorial thereof, was entered and registered in the *South-Sea* company's book, as is required by the statute in that case made and provided. To the three first the plaintiff had judgment upon demurrer; and as to the last plea, the plaintiff took issue, which being tried, the sitting after last *Michaelmas* term before lord chief justice *Pratt* in *London*, the plaintiff produced the register-book of the *South-Sea* company, wherein a copy of the contract was entered *verbatim*, under which was subscribed, "This is for my proper use and benefit," which was subscribed by the plaintiff with his own name, *Philip Wilkinson*; upon which the defendant's counsel objecting, that the register did not express the name of the person, for whose use and benefit the contract was made, according to the direction of the statute, the statute requiring the entry to express the name of the person, for whose use the contract was made,

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made, which relates to the time of making the contract, whereas this entry only expresses the name of the person, for whose use and benefit it was at the time of registering; the chief justice *Pratt* directed the jury to find a verdict for the plaintiff for 1436*l.* 10*s.* but subject to a case to be made for the opinion of the court, and the *posse* was to be stayed in the mean time. Accordingly a case was settled by the counsel on both sides, and signed by Sir *Clement Wearg* for the plaintiff, and Mr. *Fazakerley* for the defendant, which stated the contract *in haec verba*, and the breach assigned in the declaration, and the pleas, and issue, and evidence of the register as above; and farther, that no evidence was offered, that the contract was made for the benefit of any other person besides the plaintiff, nor any that the said contract was made for the use and benefit of the plaintiff only. And the 24th of *April* this term this case was argued by Mr. *Strange* for the plaintiff, and Mr. *Fazakerley* for the defendant.

The clause in 7 *Geo. 1. stat. 2. s. 8.* upon which this question depends, is to this effect, "That every contract for the sale or purchase of subscriptions or stock of the *South-Sea* company, &c. which shall not be compounded by the parties thereto, or interested therein, on or before the 29th of *September* 1721, or an abstract or memorial thereof, signed by the party interested therein, and who shall be minded to take advantage of the same, shall be entred and registered in books, which are thereby required to be provided for that purpose by the respective companies, to whose capital such stock, &c. do or shall relate, before the first of *November* 1721, and in default of such entry and register, every such contract, as to so much as shall remain unperformed and not compounded on or before the 29th of *September* 1721, shall be void: and that such entries shall express the name of the parties or persons for whose use or benefit such contracts were made. &c."

Mr. *Fazakerley* insisted for the defendant, that the words of the act were plain, that the name of the person for whose use or benefit the contract was made must be expressed, which refers to the time of the making the contract: and the act intended so, because it designed to discover what contracts were made for any of the directors, who were so cunning, that they made none in their own names. But yet as this register is, this contract might be made for the benefit of a director, who after might release his equity or right to the plaintiff; and yet the register will be true. But Mr. *Strange* for the plaintiff argued, that the preamble to this clause shewed what the design of the parliament was, viz. for preventing a multiplicity of vexatious and doubtful suits

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suits concerning these contracts in law or equity; therefore it directed the name of the person, for whose use or benefit such contracts were made, should be expressed in the entry and register, that the defendant might know, who had a demand upon him; which in this case the defendant did, the intire contract being registered: and by the import of the deed it appears to be for the plaintiff's benefit. And of that opinion was the court; and *Raymond* justice said, that this act being *ex post facto*, the construction of the words ought not to be strained, in order to defeat a contract, to the benefit whereof the party was well intitled at the time the contract was made. Judgment was given for the plaintiff.

The inhabitants of Buckingham *against* The
inhabitants of St. Michael Sebington in
Somersetshire.

S. C. Str. 582. 3 Mod. 235.

The failure of
the master does
not dissolve an
apprenticeship.
S. C. Str. 582.
3 Mod. 235.
1 Sess. Caf. 278.
Fort. 321.

An apprentice
cannot legally
let himself until
his apprentice-
ship is dissolved.
S. C. Str. 582.
3 Mod. 235.
1 Sess. Caf. 278.
Sett. & Rem.
117. pl. 155.
Fort. 321, vide
Burn. Poor.
Settlement by
apprenticeship.
26. 14th Ed.
vol. 3. p. 382.

The surrender of
the indentures
by the master
after the letting
will not relate
back so as to
make the letting
lawful.

A settlement
cannot be gained
by hiring and
service, unless the letting was lawful. S. C. Str. 582. 3 Mod. 235. 1 Sess. Caf. 278. Sett.

and Rem. 117. pl. 155. Fort. 321. vide Burn. *ubi supra*.
(a) According to the Report in 3 Mod. 235. 1 Sess. Caf. 278. J. S. did not deliver up the
indentures until the expiration of the time limited for the apprenticeship.

AN order made by two justices for removing *Richard Allen* a poor person to *Buckington* as the place of his last legal settlement, and an order, confirming the same made at the quarter sessions, being removed into the king's bench by *certiorari*, the fact stated specially in the order of sessions was, That *Richard Allen* was bound an apprentice to *J. S.* in *Buckington*, and served him in that parish six months; afterwards *J. S.* broke; upon which *Allen*, without *J. S.*'s direction or consent, let himself as a servant to *J. N.* who lived in *St. Michael Sebington*, and served him there two years: that (a) afterwards *J. S.* delivered up to *Allen* his indenture of apprenticeship. And the court of king's bench was unanimous of opinion, that *Allen* gained no settlement by his service at *Sebington*, he having let himself without his master's consent; and though the master had failed, yet that did not determine the apprenticeship, but the apprentice continued not *sui juris*: and the master's delivering up of the indenture afterwards, if it should be looked on as a subsequent consent, will not make his letting himself good, so as to gain a settlement by his service with *J. N.* but if he had let himself to *J. N.* with *J. S.*'s consent, his service would have made a settlement. 1 *Salk.* 68. parishes of *Caster* and *Eccles*. But *Allen* was settled in *Buckington*, where he was bound apprentice, and lived and served his master above forty days. The orders were confirmed.

John Stevenson jun. *vers.* William Nevinston,
Mayor of Appleby, and the common council of Appleby.

TO a *mandamus* issued out of the king's bench directed to the defendants, commanding them to restore the plaintiff to the office of a common council man of the borough of *Appleby* in *Westmorland*, they among several other facts returned that the plaintiff was not elected a common council man, as in the writ was supposed. To which return the plaintiff came in, and denied the several material facts relied on by the defendants in their return; and among the rest alleged, that the plaintiff was chose a common council man, as in the writ was alleged, and concluded to the country. Upon which as well as the other facts issue was joined, and the several issues were tried at the bar *May* 6, this term. And after the plaintiff had proved the fact of his being elected common council man, Mr. serjeant *Pengelly* for the defendants insisted, that by the constitution of the borough, which was by prescription, no person was capable of being elected a common council man of the borough, who did not hold a burgage tenure, and also inhabit within the borough; but the plaintiff inhabited in *Bondgate*, which was severed from the borough, and no part of it. To prove which constitution, the first witness produced was one *Richard Woofe*. But it being objected for the plaintiff, that he had a burgage tenure, and also inhabited in the borough, and could not be a witness to prove a right in himself, and such as had his qualifications, exclusive of all others; which fact being admitted, he was refused by the court to be admitted to prove this constitution. But then one Mr. *Lee* was produced as a witness for the defendants, to prove it, who was an inhabitant of the borough, but it was admitted he had no burgage tenure. Whereupon he was allowed by the court to be a good witness, as to the right fixing in such as had held burgage, and also were inhabitants, since he did not attempt to establish the right in the inhabitants only. But after a long examination a verdict was given for the plaintiff upon all the issues.

A man who has only one of two qualifications may be called as a witness to prove that certain privileges belong to such persons as have both. S. C. Str. 583. vide ante 731, and the books and cases there cited.

A man who has both cannot.

John Tufton Esq; *vers.* William Nevinston,
Mayor of Appleby in Westmorland.

If a statute provides that no person shall be elected into a particular office who shall not have complied with a certain requisite, upon the issue whether J. S. was elected or not, it is incumbent on the party who insists that he was to shew that he had complied with the requisite. S. C. Str. 585.

If J. S. were a candidate for the office, and obtained a mandamus to swear him in, being duly chosen, upon a return that he was not duly chosen and an issue thereon, it would be incumbent on him to prove that he had complied with the requisite. S. C. Str. 585.

Tho' it was not required of him at the election.

And he had no notice that it would be required of him at the trial. S. C. Str. 585.

A provision in a statute that persons of a particular description should not be removed from particular offices in a corporation or prosecuted, will not intitle a person of that description to insist upon being sworn in to any of those offices.

(a) Vide Cowp. 535, 536, 539.

(b) Vide Cowp. 536, 539.

13 Car.

TO a *mandamus* directed to the defendant, commanding him to swear the plaintiff into the office of an alderman of that borough, being duly chosen; the defendant among several other facts returned, that the plaintiff was not elected an alderman, as by the writ is supposed. And issues being joined upon them, they came to be tried at the bar, *Saturday May* the 9th this term. The plaintiff gave evidence, that he was elected alderman, *Monday before Michaelmas 1723*. But it was objected by Mr. serjeant *Pengelly* for the defendant, that Mr. *Tufton* ought to prove, he (a) had received the sacrament within a year before his election; the express words of the 13 *Car. 2. c. 1. s. 12.* being, that no person shall for ever hereafter be elected, &c. into any the offices aforesaid, that shall not have within one year next before such election taken the sacrament, &c. and in default thereof every such election is declared to be void. To which Mr. attorney general *Yorke* and serjeant *Comyns* answered for the plaintiff, that first at the time of the election no such objection was made to Mr. *Tufton*, and that they proved by witnesses; therefore the plaintiff could not expect this objection would be made at the trial, and came not prepared to make out that fact. But the defendant, if he intended to insist on proof of this matter, should have given notice to the plaintiff before the trial, and then he would have provided to have proved it. Serjeant *Comyns* also said, that the act 5 *G. c. 6.* for quieting and establishing corporations, confirms persons then in offices, &c. who had omitted receiving the sacrament, as 13 *Car. 2. c. 1.* directs, and discharges them from all forfeitures for the same, and enacts that no person, who shall be thereafter elected, &c. should be removed by the corporation, or otherwise prosecuted for such omission, nor should any incapacity or disability, &c. be incurred, by reason of the same, unless such person be so removed, or such prosecution commenced, within six months after such person's being elected, &c. And Mr. *Tufton* was elected alderman, *Monday before Michaelmas 1723*, so that above six months are elapsed since the election. But the whole court were unanimous in opinion: First, that this (b) case was not within the act of the seventh of his majesty, because the plaintiff never was admitted into the office, and therefore could not be removed, nor incur a forfeiture: Secondly, that it was incumbent on the plaintiff, to prove that he had received the sacrament, &c. within a year before his election, by

13 Car. 2. c. 1. else his election was void. And so it was said to have been ruled by lord chief justice *Parker*, between *Vavaſor* and *Hammond*. And so it was held in the case between the king and *Musket*, concerning a member of the corporation of *Buckingham*; only a difference was there taken, that in case a member of a corporation had been long in possession of his office; there ought to be notice given, that this would be insisted on at the trial. But here the plaintiff has never been admitted into the office, but sued this *mandamus* to get himself sworn in. As to this, which was the fifth issue concerning the plaintiff's election, the jury by the direction of the court found for the defendant. As to the four other issues, they found for the plaintiff.

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Hugh Machell *vers.* William Nevinston, mayor of Appleby in Westmoreland.

THE plaintiff sued a *mandamus* out of the king's bench, directed to the defendant, commanding him to swear the plaintiff into the office of a common-council man of the corporation, being duly chosen. To which the defendant returned, that the plaintiff was not elected a common-council man, as by the writ was supposed. Upon which issue being joined, the issue was tried at the bar, *Saturday May 9*, this term. And upon the evidence it appeared, that the corporation was a corporation by prescription, consisting of a mayor, twelve aldermen, and sixteen common-council men, besides the freemen at large; that the mayor was to be chosen out of the aldermen by the common-council, the aldermen to be chosen out of the common-council or freemen, and the common council to be chosen out of the freemen by the common-council; and if the common-council were equally divided, then the aldermen were to vote; and if they were equally divided also, then the mayor had a casting vote: that the mayor was to serve for a year, and until another was chosen; that the members used to be summoned to meet to choose a mayor, by order of the old mayor, and no certain time was fixed for the choice of a mayor, it used to be about *Michaelmas*; but 26 *May* 1674 an order was made by the mayor, aldermen and common-council men, that they should for the future meet on the *Monday* before *Michaelmas* day every year, to chuse a mayor, under a penalty inflicted upon every one of them that wilfully absented himself; that at other days, for filling up vacancies of aldermen or common-council men, the mayor used to summon the body, and they never used to meet without such a summons; and when they met, acquainted them with the vacancy, and with the occasion of the meeting, and always sent out a summons for the meeting on the day, which they called the charter day: that the mayor, eleven aldermen, and fifteen com-

In a corporation by prescription, if the right of electing common-council men is in the common-council and they have never in practice proceeded to an election without being summoned for the purpose by the mayor, an election by some of them at a corporate meeting for another purpose is void notwithstanding all the common-council men were present at the time, had notice of the election, and might have concurred in it. Vide Str. 385. post. 1358. Burr. 723.

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mon-council men met 23 September 1723, being the *Monday* before *Michaelmas*, in the *Moothall*: the mayor declared, their meeting was to elect a mayor; upon which some of the common council said, there was a vacancy of an alderman and common-council-man, and they would first proceed to fill up those vacancies; but the mayor said, they were filled up: upon which nine of the common council withdrew into the council chamber, six of them staying in the *Moothall* with the mayor: the nine elected the plaintiff a common-council-man, and signed a paper purporting their election, and brought it, and tendered it to the mayor, and desired him to swear the plaintiff; but he refused, and said, *currat lex*. The plaintiff attempted to prove, that it was usual to fill up vacancies the *Monday* before *Michaelmas*, before they elected the mayor; but only one instance was given in evidence, of one *Gregson* chose common-council-man on that day before the mayor was elected, and that but two years before the election of the plaintiff; and it did not appear, but the mayor directed the going to that election, and that all the common council then living were present and consenting. But all the witnesses for the plaintiff agreed, they never knew before this time an instance of proceeding to fill up a vacancy, without the mayor's declaring the vacancy, and directing them to proceed to fill it up.

The facts appearing thus upon the evidence, Sir *Thomas Pengelly* his majesty's first serjeant, Sir *Clement Wearg* solicitor general, and Mr. *Rerve* and Mr. *Boote*, insisted for the defendant: that upon the plaintiff's own evidence the election of him to be a common-council-man was a void election; for they said, this being a corporation by prescription, the right and manner of election was to be governed by the usage: that for the election of aldermen and common-council-men at any other time but this *Monday* before *Michaelmas*, it was agreed, there ought to be a preceding summons from the mayor for the corporation to meet: and so it was in case of election of mayors before the order in 1674: that since that time a summons used to go to meet that day; that that day was only for electing mayors, founded upon that order: that all the witnesses agreed, the mayor used to declare the vacancies of aldermen and common-council-men, and direct the common-council-men to proceed to an election, and did not know an instance to the contrary till this time. But indeed they said, the common-council thought they had a right to proceed to such election, when they were met, without such direction; but that was a mistake in them, for there was no usage to found such opinion upon: that though some of the witnesses said, they had several times elected aldermen and common-council-men this *Monday* before *Michaelmas* before they elected the mayor; yet they could give but one instance, which was of one *Gregson* elected so common-council-man

two years before the election in question; and they could not say, but in that as other cases they had a general memory of, though they could not recollect particular names, the mayor might direct the going to those elections, and that all the common-council-men concurred in it: that the mayor's presence being necessary at the meeting he ought to preside, and for avoiding confusion ought in reason to give directions, though he did not vote among the common-council in the election; and that as the usage gave the common-council a right of electing; the same usage gave the mayor a right of directing when they should proceed to the election. But in this case the mayor refused it, said the vacancies were filled up, *currat lex*; that six of the common-council did not go into the council-chamber, but stayed with the mayor; and therefore this not being a day appointed for chusing common-council-men, nor no summons for that purpose, part of the common-council, though the mayor part, could not elect to bind the rest; and therefore they concluded, this election of the plaintiff was a void election.

But Mr. attorney-general *Yorke*, serjeants *Comyns* and *Probyn*, Mr. *Hungerford* and Mr. *Usher*, argued, that the election of the plaintiff was good. They said, that what the defendant's counsel insisted upon, was to put the whole power over the corporation in the mayor; and that to allow their objections, was to permit the mayor to take advantage of his own default. They urged, the assembly here was regularly held, that all the common-council in being were there, that the mayor himself had no vote in the election of aldermen or common-council-men; that his presence was necessary in the *Mootball*, but his assent to or approbation of the election was not necessary; that the mayor's withdrawing, when they were in the council-chamber, could not dissolve the common-council; then nine going into the council-chamber was a majority of the common-council, and their acts would bind the rest, who might come in if they would, as all the witnesses proved: that the act of filling up the corporation was a necessary act, and ought to be supported, if by law it could.

The court were unanimous of opinion, that the election was void for the reasons given by the council for the defendant; and said it was almost the same case with that of the king v. *Carlisle* corporation, T. 6 G. B. R. 1720, Str: 385. where upon a return to a *mandamus* to restore *Coulter* to the office of a capital burghess, it appeared, that the power of removing a member was in the mayor and aldermen, or major part of them; the summons was of the whole corporation to elect a recorder; and after that election was made, the mayor and aldermen separated themselves from the rest, and removed *Coulter* for misbehaviour, &c. and held the removal was void, when there was no summons

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to meet as mayor and aldermen, but only as part of the whole body. By direction of the court the jury gave a verdict for the defendant.

Sir Christopher Musgrave *vers.* Nevinson,
mayor of Appleby in Westmoreland.

S. C. Str. 584.

The election of an alderman in a corporation upon a casual meeting of the electors is void, unless all the electors concur in it. vide ante 1355.

A new trial shall be granted after a trial at bar, if the court was dissatisfied with the verdict. Vide Sty. 462, 466. 1 P. Wms. 207. Str. 1135. 2 P. Wms. 563. 12 Mod. 93, 128. but see also 1 Sid. 58. T. Jon. 224. 7 Mod. 37. an'c 514. altho' such verdict would not be conclusive of the right in question.

THE plaintiff sued a *mandamus* out of the king's bench directed to the defendant, commanding him to swear the plaintiff mayor of *Appleby*, being duly chosen. To which the defendant returned, the plaintiff was not elected mayor, as by the writ was supposed. Upon which issue being joined, it was tried at the bar, *Saturday May* the 9th this term. The constitution of the borough was admitted to be, that the mayor was to be chosen out of the aldermen. And therefore it was insisted upon by the defendant, that the plaintiff should prove his being an alderman. And upon the evidence the fact appeared to be thus, viz. that the 5 *December* 1721, the mayor, aldermen, and all the common-council-men then alive, being fifteen (except one *Rasbrook*, who three or four of the plaintiff's witnesses swore they believed was there, but he himself swore positively that he was not there at the time *Christopher Musgrave* was elected alderman, but came in after he was sworn, giving a particular account of the circumstances of the time he was sent for that evening, and of the time of his coming into the room, and that he was told, Sir *Christopher* was sworn as he came along, and after he came they never asked his vote) met at a public house in *Appleby* to drink some punch, and the mayor had invited one or two of them to be there, to treat Sir *Christopher Musgrave*, who was present; that at the time of their meeting none of the common-council knew there was a vacancy of an alderman, for one *Warcup* had signed and sealed a resignation of his office of alderman but the day before. After a glass or two had gone round, Mr. *Christopherson*, a clergyman then in company, acquainted them, *Warcup* had resigned, and produced his resignation, and proposed the choosing Sir *Christopher Musgrave* alderman: whereupon he asked every common-council-man-man there (for in them only the election of aldermen was, and the aldermen had nothing to do in the election, unless the common-council were equally divided) and they all consented, except *Barnes*, *Robinson* and *Lamb*, who said it was not convenient at that time of night, nor in that manner: upon which the mayor said, if that was not right, he would adjourn to the *Mootball*, to which *Barnes* replied, it was not necessary to give Sir *Christopher* the trouble to go to the *Mootball*, if all were agreed; for the marquis of *Wharton* was chose at his house; but *Lamb* or *Robinson* said nothing: that afterwards the mayor sent *Carleton* for the books: Sir *Christopher* was entered in the

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the books, and sworn alderman, and acted as such afterwards in five assemblies, till he was elected mayor. No evidence was given that the said three common-council-men ever assented to the election, but they were in company all the time after: nor were the common-council-men called over one by one by the proper officer, as was usual in such elections: nor were the common-council-men separate from the aldermen, as likewise was usual: and *Dean* another common-council-man swore he was there; that he opposed it, and no body after asked him if he consented: that he did not see *Resbrook* there when *Sir Christopher* was sworn; and *Resbrook* told him soon after, that he was not in the room when *Sir Christopher* was sworn: that the entry in the books of *Warcup's* resignation was made by *Carleton* the town-clerk some time after *Sir Christopher* was sworn, a week or more, but it was by direction of the mayor given when *Sir Christopher* was sworn. This evidence being summed up to the jury by lord chief justice *Pratt*, with great stress laid on the evidence for the defendant, they gave a verdict for the plaintiff, to the dissatisfaction of the court, who looked upon the plaintiff's election to be void. For the body not being corporately assembled for want of a previous summons, but the meeting only being to drink a glass of wine, and not knowing at the time of their meeting of a vacancy of an alderman, and opposition being made by three of the common-council, and no proof of their actually consenting afterwards (which the court held absolutely necessary in such a case as this) and it being expressly sworn by *Resbrook*, that he was not there at the election or swearing of *Sir Christopher*; and in case of such an accidental election the court held every member who had a right to vote, ought to be present and assent; they were of opinion, it was an election obtained by surprize, and consequently void. After which, *Saturday May 16*, Mr. serjeant *Pengelly*, and the other counsel for the defendant, moved for a new trial, the verdict being contrary to the evidence; which the court agreed; but then it was insisted on by the counsel for the plaintiff, no new trial should be granted after a trial at bar, where facts were only left to the jury. But granting new trials in cases at bar, is only where the jury determine against the law, or give a general verdict against the express direction of the court, as in the case of the *Queen* against *Bewdley* corporation, 1 *P. Wms.* 207. the jury found a general verdict, where the court had directed, and the counsel on both sides agreed, the verdict should be found specially; a new trial was granted, *Trin.* 11 *Ann. B. R.* Besides, where verdicts are not conclusive to the right, new trials do not use to be granted, though the verdict is against evidence; as in ejectments, because the party may bring new ejectments: 1 *Salk.* 648. *Argent* against *Sir Marmaduke Darrell*: 1 *Salk.* 650. *Fenwick v. lady Grosvenor*: *Sir Thomas Jones*

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224, 5. *King v. Foster*. Now here this verdict being in a *mandamus* does not conclude the right, for it may be tried afterwards in an information in nature of a *quo warranto*. But *per totam curiam* a new trial was granted. For they held, that where the evidence was doubtful, a new trial should not be granted after a trial at bar; and therefore it was denied in the case of *Soams* and *Barnardiston*, and the Queen v. the Warden of the *Fleet*. But where it is against evidence, it may. So is *Stiles* 462, 466, *Wood v. Gunston*, for excessive damages, and yet the jury are the proper judges of the damage. And the chief justice *Pratt* said, a new trial was granted in the case of *Sir Jos. Tilley* against *Roberts* after a trial at bar, because the verdict was against evidence, and the question was, *compos* or *non compos*, which was mere matter of fact. And afterwards, *Monday May* 18. Mr. Attorney General moved in behalf of *Sir Christopher Musgrave* for a trial at bar next term. But upon a treaty the parties entered into a rule by consent, that the corporation should 11th of *June* next proceed to an election of common-council-men, aldermen, and mayor.

Inhabitants of Bamber *against* the Inhabitants of Hannington.

One justice alone could not under 12th Ann. st. 2. c. 23. send a vagrant to the place of his last legal settlement.
(a)

AN order was made by one justice of the peace, reciting that *J. S.* was taken wandring, &c. and reciting the place of his last legal settlement to be at *Bamber*, to send *J. S.* to *Bamber*, &c. Mr. *Strode* upon the 12th Ann. st. 2. c. 23. s. 4. took exception to this order, because it was made by one justice; for though one justice may make a pass to pass him as a vagrant, yet there must be two justices to make an order to remove him to the place of his last legal settlement; the words of the act being, that he is to be sent to the place of his last legal settlement by such order and in such manner, as by the laws of this realm other persons likely to be chargeable to the parish are to be sent. And upon considering the act, and the several *Sections* 4, 5, 6. the court was of that opinion, and the order was quashed. Mr. *Hussey* counsel with the order.

(a) The 12th Ann. st. 2. c. 23. is now repealed;

The King *vers.* Cawood.

S. C. Str. 472.

THE defendant was found guilty upon an information, for setting up a bubble called the *North Sea*, founded upon the act of 6 G. 1. c. 18. s. 19. and was brought up several terms ago to receive judgment. And it was insisted on, that judgment ought to be given against him by that act, as if he had been found guilty of a *premunire*. And the court took time to consider of it, and in the mean time he was committed to the king's bench prison, and afterwards escaped; but being re-taken, he was brought May 18 this term to receive judgment. And the court were all of opinion, that they were not obliged by that act, to give the whole judgment as in case of a *premunire* against him, but only such part of it as in their discretions they should think fit. And therefore a fine of 5*l.* was set on the defendant, and judgment, that he should remain in prison during the king's pleasure.

If a statute provides that any person convicted of a particular offence shall be liable to such fines, &c. as persons convicted of nuisances are liable to, and moreover shall incur and sustain any further pains, &c. as were ordained and provided by a particular statute the court has a discretionary power of inflicting all or a part only of the pains, &c. ordained by that statute.

Jenney and others *against* Herle. *Error C. B.*

S. C. Str. 591. 8 Mod. 265. 10 Mod. 294. 316.

Intr. Pasch. 9 Geo. B. R. Rot. 144.

IN an action on the case on several promises, there were five several counts in the declaration: as to four of them the defendants pleaded *non assumpsit*, and issue was joined upon it; but afterwards the plaintiffs entered a *nolle prosequi* as to them. But the other was upon a bill of exchange, wherein the plaintiff *Herle* in the common pleas declared, that the defendants 27th of September 1720. at, &c. according to the custom of merchants made a bill of exchange signed with their own hands, directed to *John Pratt*, by which the defendant did require the said *John Pratt* to pay to the plaintiff *Herle* 1945*l.* upon demand, *ex moneta per eandem billam mentionata tum fore in his hands spectante ad proprietarios quorundam hereditamentorum vocatorum the Devonshire mines and quarries, existente parte denariorum vocatorum the consideration money pro emptione, Anglice the purchase, manerii de West Buckland: that Pratt refused to accept the bill, whereby the defendants became liable to pay the plaintiff that sum of money, and being so liable promised to pay, &c. To this count the defendants demurred in the common pleas, and an interlocutory judgment was given for the plaintiff *Herle*, a writ of enquiry executed, and 1945*l.* damages found, and final judgment in the common pleas for *Herle*. Upon which the defendants brought a writ of error. And after argument by Mr. Solicitor General *Wearg* for the plaintiffs in error, and by serjeant *Chapple**

An order for the payment of money out of a particular fund is no bill of exchange.
R. acc. post. 1563. D. acc. Ann. 2. vide Bayley 3. 4.

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for the defendant, the judgment of the common pleas was reversed by *Pratt* chief justice, *Fortescue* and *Raymond* justices, *Powys* being absent; they being of opinion, this was not a bill of exchange, but a bare appointment to pay money out of a particular fund, with a view of having it paid out of which fund the defendants probably drew the bill, and never designed the bill should be payable at all events, but only out of the particular money mentioned in the bill, supposed to be in Mr. *Pratt's* hands. And it would be very mischievous, to make such notes as these, which were but appointments, bills of exchange; for at that rate, if a tradesman applies to a gentleman for money for his bill, says the gentleman, I will direct my steward to pay you, and writes to him, pay to J. S. the money mentioned in this bill out of my rents in your hands; the steward has no rents in his hands; it can never be imagined, the gentleman should be liable to be sued upon this, as upon a bill of exchange. And the case of *Jocelin and Lascerre*, *Fort.* 281. 10 *Mod.* 294. 316. was cited, which was *Posth.* 1 *Geo.* 1. B. R. where a bill was drawn upon an agent of a regiment, pray pay out of my growing subsistence, &c. and adjudged no bill of exchange. And though the counsel objected, the reason of that case was, because it depended upon a contingency, yet justice *Fortescue* said, the reason was, because it was payable out of a particular fund; and if that was the reason of it, it is the case in point. There was also cited in the argument of this case, the case of *Smith v. Boheme*, *M.* 1 *Geo.* B. R. *post.* vol. 3. p. 67. *cit. post.* 1396. where the note was I promise to pay J. S. so much money, or render the body of J. N. to prison before such a day; and it was (a) adjudged to be no negotiable note within the act of parliament, and that an action could not be maintained on that note within that law; because the money was not absolutely payable, but it depended upon a contingency, whether he would surrender J. N. to prison, or not. Judgment was reversed, *Tuesday June 9, 1724.*

(a) Vide Bayley
3.

Intr. Trin.
9 Geo. B. R.

Morris and others *vers.* John Watkins.

In an action at the suit of several plaintiffs if the introductory part of the declaration states that the defendant is in custody of the sheriff by virtue of a latitat issued, &c. of a plea that he render to them, it must be taken that the latitat was sued out by the plaintiffs. Vide 1 *Wils.* 119.

THE plaintiffs declared against the defendant, as a prisoner in custody of the sheriff of *Monmouth*, in debt upon a bond for 100*l.* and the declaration was, *Bridget Morris* and the other plaintiffs *queruntur de Johanne Watkins clerico, in custodia Henrici Morgan armigeri, vicecomitis comitatus Monmouth, virtute brevis domini regis vocati, a latitat, e curia banci regis emanantis, et eidem vicecomiti directi, de placito quod reddat eis 100*l.* &c.* And on demurrer the exception to the declaration was, that by the sta-

tute of 4 & 5 W. & M. c. 21. s. 3. it is enacted, that in all declarations against any prisoner detained by virtue of any process issued out of the king's bench, it shall be alleged, in custody of what sheriff, &c. such prisoner shall be at the time of such declaration, by virtue of the process of the said court, at the suit of the plaintiff; and it did not appear by this declaration, that the defendant was in custody at the suit of the plaintiff. And after this had hung two or three terms, this term June 20. the court gave judgment for the plaintiffs, for they would explain at whose suit the *latitat* was, by the following words, *de placito quod reddat eis*, i. e. the plaintiffs, the 100*l.* for if the *latitat* was, that the defendant *reddat* to the plaintiffs 100*l.* it must be understood, at their suit.

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The King *vers.* Godfrey.

AN order made upon the defendant to maintain a bastard child was quashed because though in the complaint it was alleged, the child was born in the parish of *Hitchin* in *Hertfordshire*, yet there was no adjudication by the justices, nor no words of the justices from whence it could be collected, in what parish the child was born. And a case was cited by Mr. Lee, the *Queen v. Biddington*, *Posth.* 10 *Ann.* where such an order was quashed for this very exception. Mr. Lee for quashing the order, Mr. *Corningsbye* for maintaining it.

In an order for the maintenance of a bastard the justices must shew in what parish it was born: 'tis not sufficient that it is alleged in the complaint stated in the order.
S. C. 1 Sess. Ca. 292. pl. 229.
R. acc. Sect. and Rem. 36. pl. 59. Str. 437. 1 Barnard. B. R. 326.

The King *vers.* Crowhurst.

THE defendant was indicted at the quarter-sessions of the county of *Kent*, as overseer of the parish of *Swanscombe* in that county, for disobeying an order made by two justices of that county, whereby they ordered the churchwardens and overseers of that parish to pay 4*s.* per week to the keeper of the house of correction there for the maintenance of one *Baker* a lunatic committed to that house of correction, as long as *Baker* should continue there in custody: and the indictment set out, that the defendant was one of the overseers, &c. and had notice of the order, and was requested to pay the 4*s.* per week by the keeper of the house of correction, but had not paid it, &c. And upon a demurrer to this indictment, it being removed into the king's bench by *certiorari*, exception was taken by serjeant *Baines*, that there was no positive averment in the indictment, that the two justices had made such an order; for it was only by way of recital, *quod cum* the two justices made an order, &c. and for this reason two indictments were quashed for not obeying an order for receiving a bas-

An indictment for disobeying an order of justices must shew explicitly that an order was made; 'tis not sufficient to state the order by way of recital.

tard

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(a) Vide Str.
622. 1 Will.
99. 2 Will. 203.

tard child. *Salk. 371. the King v. Whitehead.* And unless there was such an order, which ought to be positively alleged, there could be no disobedience of it. Mr. *Reeve* for the king insisted, that in trespass the (a) declaration will be ill, if it is laid with a *quod cum*, because then the whole declaration is but recital, and there is no positive averment at all. But an action for disturbing the plaintiff in enjoyment of his common laid with *cumque etiam* the plaintiff had a right of common, is good. 2 *Mod. 142. Styleman v. Patrick.* And he cited the case of the *Queen v. Goddard and Carleton. Trin. 2 Ann. B. R. ante 920.* where in an indictment for forging the assignment of a lease, it was, *quod cum testatum existit per quandam indenturam*, that *J. S.* demised, &c. the defendant *falsa fabricavit quandam assignationem in scriptis* of that lease, *cujus tenor sequitur in hac verba*, and then set out the assignment, &c. and exception being taken, that the lease was ill set out, because it was with a *quod cum*, which is not positive; yet *Holt* chief justice and the other judges held, it was well enough, because it was only by way of recital that the lease was laid, but the forging of the assignment was laid positively, which was sufficient. So here the order is only set out by way of recital, but the non-payment of the 4s. per week, &c. is positively alleged. *Sed non allocatur*, for *per curiam* if there was no order, there could be no breach of that order, and therefore that ought to be positively alleged. And as to the case of the *Queen v. Carleton*, the forgery was the offence, and that was positively averred; however, though the court seemed then to be of that opinion in that case, yet it was never adjudged, for the cause was not determined, nor judgment ever given upon that indictment. And the case cited out of *Salkeld* is in point. And judgment was given for the defendant.

The King *vers.* Burridge.

S. C. Str. 593. 8 Mod. 245.

If a party enters into a rule that the master shall name 48 for a special jury, each party strike out 12 and the sheriff return the other 24, and the jury are struck and returned accordingly, 'tis a contempt in him to challenge the array, tho' he may the polls.

AN information was filed in this court against the defendant late mayor of *Tiverton*, for voluntarily absenting himself the day appointed by the constitution of the borough for electing a person to succeed him in that office for the year ensuing, whereby the corporation was hindered from proceeding to the election, &c. And issue being joined, on not guilty, a rule was entred into by consent of the counsel on both sides, that the sheriff of *Devon* should attend the master of the office with the freeholders book, and that he should name forty-eight out of the book, and

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each party should strike twelve a-piece, and that the sheriff should return twenty-four residue of the forty-eight, *pro triatione exitus in hac causa jundti ad proximas assisas in et pro comitatu praedicto tenendas*. Accordingly the master struck the forty-eight, and each party struck out twelve, but the defendant's agent struck out three of the four hundredors. Notice of this was took, when they were before the master, that there were but four hundredors; and the defendant's agent was told, that if they were partial, they might be challenged upon the trial, and that they should stand the last in the panel; and the prosecutor offered to consent, that they should not be upon the jury at the trial; and there was an attendance before lord chief justice Pratt about it. Yet notwithstanding this, the defendants persisted in striking them out. And when the cause came down to trial at last Lent assizes held for the county of Devon before justice Denton, the counsel for the defendant challenged the array for want of hundredors. The counsel for the prosecutor produced the rule of court and insisted, the challenge should not be received. But the judge said; he would receive the challenge, and leave the parties, if it was a breach of the rule, to prosecute for the contempt. Upon which the counsel for the prosecutor pleaded the rule as a counterplea to the challenge; but Mr. justice Denton being of opinion, that the rule did not bar the defendant from taking this challenge, he allowed it, and the panel was quashed. Upon which a motion was made for an attachment against the defendant, for a contempt in taking this challenge, in breach of the rule by consent. And a day being given to shew cause, serjeants Chapple, Shepherd, and Eyre, and Mr. Hufsey, and Mr. Fazakerley, for the defendant insisted, that the taking this challenge was no express breach of the rule within the words of it, because the words do not shew, there was any consent to wave any challenge. The consent imports no more, than that the master should strike the jury in the manner mentioned in the rule, instead of the sheriff returning it in the usual way; and in these sort of rules in the common pleas they make the parties expressly consent, not to challenge for want of hundredors; which shews the opinion of that court to be, that without these express words the rule would not restrain such challenges, and so have some rules been drawn up in this court. In queen Elizabeth's time the rule was, *quod nulla calumnia sit ex utraque parte pannello*, as 3 Keb. 740. the King v. Kiffin, after a trial at bar was ordered, a motion was made, that it might be added to the rule for the master to strike the jury, that the defendant should not challenge for want of hundredors; but the court held, they could not deprive the defendant of the privilege of challenge, which the law allowed him. And so is Stile 233. and that the defendant was justly intitled to all legal advantages, if by his own consent

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consent he has not barred himself from them, which he has not done in this case. And in the first of this king, between the *King* and *Sherwood*, a motion was made, that the defendant should consent not to challenge for want of hundredors, and the rule was drawn up so by consent. Besides, if it was a doubtful case, it would be hard to grant an attachment, now the judge of assize allowed the challenge, notwithstanding the counter-plea of this rule. On the other side Mr. serjeant *Pengelly*, Mr. *Reeve*, serjeant *Glide*, Mr. *Worth*, and Mr. *Webber*, argued for the king, that this was a plain breach of the rule, and a contempt to the court, and only a contrivance to put off the trial. And of that opinion was *Pratt* chief justice, and *Fortescue* and *Raymond* justices. For the consent in the rule is, that the sheriff shall return the twenty-four, residue of the forty-eight, for trial of the issue of the cause; but the challenge to the array is a challenge to the return of this jury by the sheriff, which the defendant had consented the sheriff should return; and therefore it plainly defeats the effect, the defendant had before consented the rule should have. And though it is not in words expressed in the rule, that the defendants should wave this sort of challenge; yet it is a strong implied waiver of it, because if this challenge is allowed, the trial cannot proceed, as the rule by consent intended: and it looks very like a concerted contrivance, only to put off the trial; because if this array should not be quashed for this challenge, the defendant would not be prejudiced; for if any of these hundredors had been partial, and not indifferent persons, the defendant might have challenged them by the poll; but that would not have put off the trial, for then the jury might have been made up by the *tales*; but there can be no *tales*, when the panel is quashed. The cases of the *King v. Kiffin*, 3 *Keb.* 740. and *Stiles* 233. were of trials at bar, where the party's consent is not added to the rule, but the court makes it by their authority without such consent. But for trials at *nisi prius* the consent of the parties is required. And an attachment was granted against the defendant absolutely, *June* the 10th this term, by the said three judges, *Powys* justice being absent.

Burgess *vers.* Bracher.

If a man agrees to ride without whip or stick or other arms, an allegation that he rode without whip and stick or other arms is unexceptionable as an averment of performance after a verdict for him. S.C. Str. 594. 8 Mod. 239. And

Q. Whether it would not be sufficient upon demurrer. (a)
(a) The report in 8 Mod. is silent as to this point; and in Str. 594. the court is made to say that the declaration would have been ill upon demurrer.

DEBT for a penalty of 40*l.* for non-performance of articles entered into between the plaintiff and defendant, for running a horse-race. Upon *nil debet* pleaded, and a verdict for the plaintiff, serjeant *Chapple* moved in arrest of judgment, that one of the agreements in the articles was, that the rider of each horse should ride *absque flagella*

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vel baculo, vel aliis armis, Anglice weapons, praeter ocreas et calcaria; and the plaintiff among the other necessary facts alleged in the declaration avers, that the rider of his horse came at the time to the starting place upon the back of his horse *cum ocreis et calcaribus, sed sine flagello et baculo, vel aliis armis*, ready to ride the course; and then sets out, that the defendant was then and there upon his horse just in the same manner, and that the plaintiff's rider and the defendant then and there *in forma praedicta* being upon the said horses did start and run, and the plaintiff's horse won the race, &c. so that this averment being, that the plaintiff's rider did ride *absque baculo et flagello*, he might have either a stick or a whip, for the averment is, he had not both; but if he had either, he did not ride according to the agreement; and therefore the plaintiff has not intitled himself to this action, because he has not shewn, he ran according to the agreement in the articles. But the court seemed all to incline, this would have been good upon a demurrer, because the averment being, that he rid *absque flagello et baculo, vel aliis armis*, &c. that *vel* made the whole sentence disjunctive, and was as much as saying, he rid without a whip or a stick, or other weapon: however, all the judges were clear of opinion, it was sufficient after a verdict; and whether it would be good or not on a demurrer, it is certainly good after a verdict; for they could not but intend, that it was proved upon the trial, that the rider rid without either whip or stick, according to the articles; otherwise the judge who tried the cause would not have permitted the jury to have found for the plaintiff. And so the truth was, for it was tried before justice Raymond, Lent assizes at Taunton. And therefore judgment was given for the plaintiff, June the 15th, 1724. 1 Salk. 325. Holt's opinion; 1 Bulstr. 293. Cox's case; Cro. Eliz. 229. Hopkins v. Stafford; and Moore 239. were cited. And for the defendant Cro. Eliz. 348. 1 Leon. 124, 5. were cited.

Michaelmas Term

11 Georgii regis, B. R. 1724.

The King *vers.* Hen. Chaveney.

A conviction
ought not to be
in English.

vide post 1394,
but see also

4 G. 2. c. 26.

A conviction for
swearing ought
to set out the
oaths sworn.

R. acc. Str. 497.

vide 8 Mod. 58.
post. 1376.

THE defendant was convicted before a justice of peace of the county of *Leicester*, for (a) cursing and swearing a great number of oaths. And the conviction being removed into this court by *certiorari*, it was quashed *November* the 9th, 1724. first, because it was in *English*; secondly, because the oaths were not set out in the conviction; on the motion of Mr. *Fazakerley* for the defendant.

(a) Vide 19 G. 2. c. 21.

The King *vers.* Will. Chaundler.

S. C. Str. 612. 8 Mod. 336. 2 Sess. Caf. 3. pl. 3.

THE defendant was indicted at the general quarter sessions of the peace for the county of *Wills*, for that *Alice Hunt existente gravida cum foetu illegitimo*, which she affirmed to be by the said *William Chaundler* of *Uphaven* in the said county begotten; he the said *William Chaundler* *praemissorum non ignarus, ea intentione ad impediendum et obstruendum evidentiam* of the said *Alice*, *de et concernente praemissa, et executionem juris pro crimine praedicto eludere*, 18 *Novembris anno domini Georgii regis 10, vi et armis apud Uphaven praedictum in comitatu praedicti duxit et duci causavit* the said *Alice ad loca incognita, et personam ipsius Aliciae occultavit, Anglice* did secrete, and the said *Alice* continue *postea hucusque occultavit, et adhuc occultat; in malum exemplum aliorum, et contra pacem dicti domini regis, coronam et dignitatem suas, &c.* To this indictment removed into this court by *certiorari*, the defendant demurred: and judgment was given for the defendant, that this indictment was not maintainable; it (a) being no offence, for which an indictment would lie, as this fact is charged.

(a) According to the Report in Str. 612. and 8 Mod. 336, the ground of the determination was that a *factus* could not be illegitimate.

Richard Aston, Esq. *against* Joseph Blagrave.

S. C. Str. 617. Fort. 206, and not quite so correctly, 8 Mod. 270.

IN an action on the case for words, the plaintiff, after the usual character of his good behaviour, set out, that whereas the first of *October* in the fifth year of his majesty's reign, and for many years before, he was and yet is a justice of the peace for the county of *Berks*, and behaved himself justly and honestly in that office, that the defendant, intending to scandalize him, and bring him into disrepute, the said first of *October* at *Wantage* in *Berks*, having a discourse with divers of the king's subjects *de praesato Ricardo, et de executione sua officii sui justiciarii ad pacem praedicti adtunc et ibidem in praesentia et auditu quamplurimorum dicti domini regis nunc subditorum tunc ibi praesentium, falso et malitiose dixit et propalavit, et alta voce publicavit, de praedicto Ricardo adtunc uno justiciariorum pacis ut praesertur existente, et de executione sua officii sui praedicti, haec ficta scandalosa et defamatoria verba Anglica sequentia, viz. Mr. Aston (innuendo the plaintiff) is a rascal, a villain, and a liar; ad damnum 20 l.* On not guilty pleaded, verdict was found for the plaintiff, and damages given 2 l. 10 s. And after several motions in arrest of judgment, that these words were not actionable, because they were general words of an uncertain signification; and words of heat only ought to be took in *mitiori sensu*, and could not be properly applied to the plaintiff as in execution of his office: for which purpose serjeant *Girdler* for the defendant cited 1 *Lev.* 52. *Bill v. Neal*, in an action for words spoke of a justice of peace; he is a fool, an ass, and a beetle-headed justice: after verdict for the plaintiff judgment was arrested by *Foster* chief justice, *Windham* and *Twissden* justices, contrary to the opinion of *Mallet*. *Cro. Ja.* 58. *Sir John Hollis v. Briscoe*, "Your master is a base rascally villain, and is neither nobleman, knight, or gentleman, but a most villainous rascal, and by unjust means doth most villainously take other men's rights from them, and keeps a company of thieves and traitors to do mischief," &c. spoke of a justice of peace, held not actionable by three justices against two. *Cases in Parl. Price v. Devall*, 12. But he admitted, the (a) defendant might have been bound to his good behaviour for speaking the words in the declaration. But *November* the 26th this term lord chief justice *Pratt*, my brothers *Powys* and *Fortescue*, and myself, gave our opinions, that the words were actionable, they being laid to have been spoken of the plaintiff in the execution of his office, and so found: so that it is the same as if the defendant had said, that the plaintiff is a villain in the execution of his office, a rascal in the execution of his office, and a liar in the execution of his office; which carry with them a great scandal, and in common understanding import a great imputation against the plaintiff's integrity and behaviour in that office; and therefore

'Tis actionable to say a justice of the peace is a rascal, a villain, and a liar, when speaking of his executing his office. vide ante 812.

(a) Vide ante 1029.

none

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none of the cases cited come up to this case. And judgment was given for the plaintiff. Serjeant *Webb* counsel for the plaintiff.

The King *vers.* Pollard and Taylor.

S. C. 2 Sess. Caf. 10. 8 Mod. 264.

If a statute makes the receiver of stolen goods an accessory to the felony, but provides that if the principal cannot be taken so as to be prosecuted and convicted, the receiver may be prosecuted as for a misdemeanour, an indictment against him as for a misdemeanour cannot be excepted to after verdict, because it does not shew that the principal could not be taken so as to be prosecuted and convicted. vide Fort. 373. 374.

THE defendants were severally indicted for receiving goods stole by one *Foster*, knowing them to be stolen, as for a misdemeanour, *contra formam statuti*. Upon not guilty pleaded they were found guilty at *nisi prius* before lord chief justice *Pratt*. And Mr. serjeant *Grove*, Mr. *Ketelby*, and Mr. common serjeant *Lingard*, moved in arrest of judgment, that by the 3 & 4 of *W. & M. c. 9. s. 5.* this offence was made felony; but by a subsequent statute, 5 *Ann. c. 31.* the receiver may be tried as for a misdemeanour, if the principal felon cannot be taken and convicted: but if the principal can be took, then the counsel for the defendants insisted, the receiver could not be prosecuted as for a misdemeanour; and therefore it is necessary in such an indictment as this, to aver that the principal felon could not be taken: but in fact they said *Foster* was afterwards taken, and tried for the felony, and acquitted; and there is no such averment in the indictment. But the judges held, upon consideration of the statutes, that the (a) prosecutor had his election, to prosecute either for felony or misdemeanour; and though there have been several indictments for such offences, yet none have had any such averment, as is insisted on to be necessary by the counsel for the defendant. Mr. serjeant *Whitaker* and Mr. *Reeve* for the king. Judgment was given for the prosecutor, June the 17th, 1724.

(a) Sed vide Fort. 373, 374.

Serle administrator of George Serle *vers.* lord Barrington administrator of Mr. Wildman.

S. C. Str. 826, but no judgment, 8 Mod. 278.

A new trial cannot be granted after the plaintiff has been nonsuited, and the nonsuit recorded. vide 3 Will. 146, 332. Comp. 484. 3 T. R. 2. An indorsement by the obligee of the receipt of interest upon a bond within 20 years after the date and the like time before the commencement of an action upon it, is admissible evidence to rebut the presumption arising from the age of the bond that it was paid. S. C. cit. 3 P. Wms. 397. vide Str. 827.

(a) Vide 3 P. Wms. 395, 396. Burr. 434, 1963. 1 T. R. 270.

hand,

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hand, who had the bond in his custody, and might enter what he pleased upon it, could not be evidence for him, nor for his administrator, though they would have been good evidence against him, that the interest was paid: and therefore he did not suffer them to be given in evidence to the jury, but told the counsel for the plaintiff, he would give them leave to move the court for their opinion. And thereupon the plaintiff's counsel suffered the plaintiff to be nonsuited. And now the 18th of June this term Mr. solicitor general *Wearg* and Mr. *Faxakerley* moved the court upon the case as before stated, and prayed, that the nonsuit might be set aside, and a new trial granted. But *Fortescue* and *Raymond* justices were of opinion, that the nonsuit being recorded, the plaintiff was out of court, and could not have the motion granted. And the motion was denied. Afterwards a new action was brought on the same bond, and on the trial before me, I admitted the indorsements to be read, and the (a) jury found for the plaintiff. Upon which a bill of exceptions being tendered, I signed it. And afterwards judgment was given for the plaintiff, and on error brought affirmed in the house of peers. 3 Bro. Parl. Caf. 535.

(a) According to the state of the case in 3 Bro. Parl. Caf. 536. other circumstantial evidence was given to induce the jury to believe the bond was not satisfied.

The inhabitants of St. John Baptist in the De- vices against the inhabitants of St. James in Bishops Cannings.

S. C. Str. 594. Settr. and Rem. 120. pl. 159. Fort. 321. fol. 156. and with the order of sessions at large. 8 Mod. 285.

TWO justices by an order removed *Warren* from *St. John Baptist* to *Bishops Cannings*. Upon an appeal to the quarter sessions they quashed the order of the two justices, and sent him back to *Saint John Baptist*, as the place of his last legal settlement; which orders being removed into the king's bench by *certiorari*, the order of sessions stated the fact specially, viz. that *Warren* was bound by his father apprentice to *J. S.* who lived in *St. John Baptist*, by indenture for seven years, and *Warren* served his time, but never lay one night in *St. John Baptist*, but worked there, and at night came and lay with his father at *Bishops Cannings*, his father all that time finding him meat and drink (except fair-days, market-days and Saturdays, when he eat with his master) and washing and lodging, according to his covenant in the indenture of apprenticeship. And *Fortescue* and *Raymond* justices (*Pratt* absent, and *Powys* dubitante) quashed the order of sessions, because binding an apprentice and serving will not make a settlement, but the settlement must be by inhabiting, which cannot be, but where the party lodges. June the 22d, 1724.

An apprentice who works in one parish and lodges in another gains a settlement in that in which he lodges. vide *Burn*, Poor, Settlement by apprenticeship. 10. Settr. and Rem. 121. pl. 159.

Intr. Hil.
9 Geo. B. R.

Stephen Biggs *against* William Benger and
Richard Greenfield.

S. C. 8 Mod. 217.

Tho' one of several defendants suffers judgment by default, the judgment against him shall be arrested, if it afterwards appears upon the record that the plaintiff was not intitled to maintain the action against any of them. S. C. S. r. 610. vide ante 1080, and the books there cited.

In an action against several defendants for seizing and selling goods if it appears upon the record that the plaintiff gave one of the defendant's leave to take and sell them, he will be precluded from maintaining his action against any of them. S. C. Str. 610.

Where intire damages are given on account of several matters, if judgment cannot be given for the whole, it shall be arrested in toto. L. no ante 329. vide post 1382. Dougl. 696.

THE plaintiff brought an action of trespass against the defendants, for that they the 20th of September 4 Geo. vi et armis the house, barn and close of the plaintiff's at Manningford in the county of Wilts, broke and entered, and the goods and chattels of the plaintiff, viz. 100 quarters of wheat, &c. there found, took and carried away, and converted and disposed to their own use; *necnon* that the defendants 21 September 4 Geo. broke and entered into another house and close of the plaintiff's at Manningford aforesaid, and kept him out of possession from the said 21st of September to the exhibiting his bill; damage 200*l.* And judgment was given against the defendant Benger by default; but the defendant Greenfield pleaded in bar as to the *vi et armis*, and all the trespass *praeter intrationem domus horrei et clausorum praedictorum, et captionem asportationem et dispositionem* of the said goods and chattels, not guilty. Upon which issue was joined. As to the said entry into the house, barn and closes aforesaid, and taking, carrying away, and disposing and converting the said goods to his own use, he pleads, that before the said trespass, viz. March 25, anno Domini 1713, the said William Benger demised to the plaintiff one messuage and five closes with the appurtenances, of which the said house, barn and closes mentioned in the declaration are and at the time when, &c. were parcel, to hold to the plaintiff from the said 25th day of March for one whole year from thence next following, and from year to year, as long as it should please the said William and Stephen, rendering 20*l.* per annum rent, payable at every year's end that the plaintiff should occupy the premises: that the plaintiff entered the 26th of March 1713, and held them to the 25th of March 1717. and because 80*l.* for four years rent was in arrear, he as servant of the said William Benger, and by his command entered into the said house, barn and closes (the doors being open) and took the said goods as a distress, and carried them away, and put them into a pound overt; and thereupon the plaintiff requested and gave licence to the defendant Richard to sell the said goods, and to pay the money arising thereby to the said William towards satisfaction of the said 80*l.* to him so due for rent; *per quod* the said defendant Richard *virtute requisitionis et licentiae praedictarum* then and there sold the said goods and chattels, and the money from thence arising, amounting to 40*l.* and no more, he paid to the said William towards satisfaction of the said 80*l.* *et c. quae sunt eadem*

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fractio et intratio domus horrei et clauferum praedictorum et bonorum et catallorum captio asportatio et dispositio, &c. The plaintiff replied, *quod praedictus Ricardus de injuria sua propria diebus et anno supradictis in the declaration mentioned praedicta domum horrea et clausa fregit et intravit, et bona et catalla of the plaintiff took, carried away, and converted to his own use; absque hoc* that the plaintiff licentiavit eundem Ricardum ad vendendum bona et catalla praedicta, as in the said defendant's plea is alleged, &c. The defendant rejoined, that the said Stephen licentiavit the said defendant Richard to sell the said goods and chattels, as he had alleged; *et de hoc ponit se super patriam.* And the plaintiff joined issue, and a venire was awarded, as well to try that issue, as to inquire what damages the plaintiff ought to recover against William Benger: and a verdict was found for the defendant Richard upon the issue, and the jury assessed damages against W. Benger 89 l. costs 40 s. A motion having been made, that the judgment ought to be arrested against Benger, since the jury had found, that the plaintiff had licensed the defendant Greenfield to sell the goods, which went to the whole, the jury having assessed intire damages against Benger; a rule was made to stay judgment, until, &c. The 8th of November serjeant Webb and Mr. Gapper moved for the plaintiff, that the rule might be discharged, and that the plaintiff might have his judgment against Benger. And they said, the difference was, where an action was brought upon a contract; which was joint in its nature, against several defendants, and where upon a tort, as for a trespass; in the first case, if one pleads a plea that goes to the whole, and upon issue joined it is found for him, and the other lets an interlocutory judgment go against him by default, the plaintiff cannot have final judgment against him; so is 1 Lev. 63. Porter against Harris. In covenant against two for not building a house for the plaintiff according to their covenant, judgment was against one by default, and the other defendant pleaded performance, and it was found for him, and judgment was arrested as to him who let judgment go by default, because in covenant, debt, or other contract, which is joint, one cannot be convicted without the other, and by the verdict for one defendant, that the covenant is performed, it appears, the plaintiff has no cause of action. But says that case, in trespass one defendant may be guilty, and the other not. In Cro. Jac. 134. Marler v. Ayliffe and Eylett: trespass for taking of a gun and dagger from him; A. justified, because the plaintiff assaulted J. S. with them, and for the safe guard of J. S. he took them from the plaintiff; E. pleaded not guilty; the plaintiff replied against him who justified, *de son tort demesne*, and the issue was found for the defendant A. and the same jury found E. guilty, and assessed damages and costs; and upon a motion in arrest of

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judgment for *E.* the court held, that the plaintiff should have judgment, because *E.* is found guilty, and cannot take advantage of *A.*'s justification; for it shall be intended, he took the gun, &c. at another time without cause: but if one defendant justifies by the gift of goods, so that he destroys the plaintiff's title, and shews that he has no cause of action, which is found for that defendant; no judgment can be against the other defendant, though he is found guilty; because it appears to the court, the plaintiff had no cause of action. They cited also 1 *Salk.* 23. where in an *indebitatus assumpsit* against *A.* and *B.* and judgment against *A.* by default; *B.* pleaded payment, and issue thereupon; Holt chief justice at *nisi prius* said, that no finding upon that issue could discharge *A.* for he had confessed the whole. To apply this to the present case, they said this was an action of trespass, and therefore judgment might be against one defendant, and the other found not guilty at all; that the matter upon which issue was taken and a verdict found for the defendant *Greenfield*, did not go to the whole, but only as to the converting and disposing of the goods to his use, viz. that it was done by licence of the plaintiff; but the licence did not go to the breaking and entry of the house, &c. And as in the before cited case in *Cro. Jac.* the court intended, that *E.* who was found guilty, took the gun, &c. at another time; so here the court would intend, *Binger's* trespass was committed by him at another time; and therefore the plaintiff ought to have his judgment against *Binger*. *E contra* it was argued by serjeant *Eyre* for the defendant *Binger*, that if in a plea personal against divers defendants the one defendant pleads in bar to parcel, or which extends only to him that pleads it, and the other pleads a plea that goes to the whole; that last plea shall first be tried, because it goes to the whole, and the other defendant shall have advantage of it; for in a personal action the discharge of one is the discharge of both. *Co. Lit.* 125. So it is held in that case in *Cro. Jac.* 134. that if one of the defendants justifies by a gift of the goods, which is found for that defendant, no judgment can be given against the other defendant, because it appears to the court, the plaintiff had no cause of action. So in this case, the verdict having found, that the goods were sold by the defendant *Greenfield* by the plaintiff's licence; that goes to the whole, as to the disposing and converting the goods to the defendant's use; and the damages being assessed intire against *Binger*, no judgment could be given for the plaintiff against him. Of which opinion was the whole court for those reasons, and judgment was absolutely arrested.

The King *vers.* Theed.

S. C. 8 Mod. 319. but not so fully reported 8 Mod. 319, and with some difference Sir. 608.

Edward Harrison 18 December 10 Geo. informed two justices of the peace for the county of Bucks, residing near the parish of *Princes Risborough* in the said county, that the defendant the 30th of *August* then last past at the said parish was, and long before had been, a maker of candles for sale, and upon the said 30th of *August* at *Princes Risborough* aforesaid did make use of a certain house in *Princes Risborough* aforesaid, for the making and keeping of candles for sale, that *Caleb Wilson* being then and there an officer of and for the duties of excise, and for the duties laid upon candles in and by the statute duly appointed, pursuant to and in execution of the power to such officer given by the said statute, upon the said 30th of *August*, at *Princes Risborough* aforesaid, did lawfully enter into the said house (so made use of by the defendant for making and keeping of candles for sale) to take an account of the quantity of the candles, which had been there made; and that the said *Wilson* then and there finding several quantities of candles lately made by the defendant (of which no account had been before taken) and certain scales and weights being then in the said house proper for weighing of candles, the said *Wilson* did then and there request the defendant to permit him to use, and to assist him in using, the said scales and weights, for weighing the candles aforesaid, to take an account of the quantity thereof; but the defendant then and there did not permit the said *Wilson* to use, nor assist him in using, the said scales and weights for weighing the said candles, in order thereby to take an account of the just quantity thereof; but did then and there refuse so to assist the said *Wilson* in weighing the said candles, and also refused to permit him to weigh the same; contrary to the form of the statute, &c. whereupon the defendant forfeited 10*l.* &c. Upon this information the defendant was regularly convicted of the facts therein contained, and they gave judgment, that he should forfeit 10*l.* one moiety to the informer, &c. To this conviction removed into the king's bench by *certiorari* Mr. Lee for the defendant took an exception, that it did not appear, that the entry of *Wilson* the officer into the house was lawful; for by the statute of 8 Ann. c. 9. s. 10. the officer may by day or night (but if it is in the night it must be in the presence of the constable, &c.) enter into the house, &c. now here it is laid, that *Wilson* entered the 30th of *August*, but it is not said, whether by day or night; it might be in the night, and then it was not lawful, because it is not said to be in the presence of the constable, &c. and if the officer's entry was

If a statute authorizes officers to enter certain houses either by day or night, provided that in case of an entry by night a constable be with him, and imposes a penalty upon the house-keeper if they refuse to aid him in doing certain acts, in a conviction for a refusal if the information and conviction state that the officer entered lawfully they need not shew whether he entered by day or night.

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not lawful, the defendant was not obliged by the act to assist him in weighing the candles, or to let him have the scales. But to this it was answered by Mr. *Reeve*, and held by the court, that the entry in the house is laid in the information to have been made *lawfully*, and it does not appear upon the face of the information that it was wrong, and therefore the court will not intend it was so, when the information and conviction say, he entered lawfully. If it had been unlawfully, the defendant would have had the benefit of it in his defence before the justices. The information pursues the clause of the act, for this conviction is founded on s. 1. And the conviction was affirmed *October 25, 1724*, by *Pratt* chief justice, *Fortescue* and *Raymond* justices, *Powys* justice absent,

The King *vers.* Roberts.

S. C. Str. 608.

THE defendant was convicted upon (a) 6 & 7 W. 3. c. 1. for swearing a hundred oaths, viz. by G—d, and a hundred curses, viz. G—d d—n you. And sergeant *Darnall* took exception to this conviction, that the oaths and curses ought to have been set out a hundred times each particularly. *Sed non allocatur*; for (b) it is sufficient to say, he swore such an oath, or made such a curse, a hundred times. But then the conviction was quashed, because the record was, that the witness *præstitit sacramentum*, &c. whereas it ought to have been in the present tense *præstat*.

(a) Vide ante 1368.

(b) Vide 19 G. 2. c. 21.

Intr. Tria. 10
Geo. B. R.

Richard Elliot *vers.* Mathew Cooper.

S. C. Str. 609. 8 Mod. 307.

An allegation that a person made a note in writing by which he promised to pay, &c. implies that he signed it. R. acc. post 1484, 1542.

IN case upon a promissory note the plaintiff declared, that the defendant the 9th of September 1723, apud &c. *fecit quandam notam suam in scriptis, vocatam a promissory note, per quam quidem notam the defendant promised to pay to Matthew Coates vel ordini three months after date 22 l. 10 s. for value received*; that the money being unpaid, the said *Coates* afterwards indorsed it to be paid to the plaintiff or order for value received, of which the defendant had notice; whereby and by force of the statute, &c. the defendant became liable to pay the note to the plaintiff, &c. To this count the defendant demurred; and demurrer being joined, Mr. *Crowle* for the defendant took an exception, that the statute of 3 & 4 Ann. cap. 9. which enables parties, to whom or order promissory notes are payable, to indorse the same, and intitles the indorsee to bring an action in his own name, extends only to notes made

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made and signed by the person that makes the note; but in this case it is not alleged that the defendant signed the note, and therefore it is not such a note as by the statute is indorseeable over, nor can the indorsee maintain an action upon it. It is possible indeed, it may be a sufficient note to be evidence of money lent, &c. by proving the note to be writ by the defendant or his direction; but that will not be a note within that act. But *non allocatur*, for my brother *Porteus* citing the late case of *Taylor v. Lobbins*, Str. 399. as exactly being this case in point, wherein notwithstanding this very exception the plaintiff had judgment, because it was said, *fecit notam suam per quam promisit solvere*, which implied it was signed by the defendant, which case *Pratt* chief justice remembred, judgment was given for the plaintiff.

The King *vers.* Plympton.

AN information was exhibited against the defendant, which set out, that King *James I.* by his letters patent dated the 10th of *August* in the 13th year of his reign, incorporated the inhabitants of *Tiverton in comitatu Devon*, by the name of the mayor and burgesses of the town and parish of *Tiverton in comitatu Devon*, that they should have a mayor, twelve capital burgesses, and twelve assistants, who should be the common council; that the mayor, capital burgesses and assistants, or the greatest part of them, every year, on *Tuesday* next after *St. Bartholomew*, should chuse one of the capital burgesses to be mayor for a whole year next ensuing, and then appoints him to be sworn, &c. which letters patent the inhabitants accepted, and ever since acted under; that the 10th of *August* 10 Geo. one *John Upcott*, Esq. was and is a capital burgess of the said town and parish, and also one *William Hewitt* was then and is one of the assistants, before that time *in officium illud debito modo electus et praefectus*; and the said *William Hewitt* as such assistant had a vote in the election of the mayor and other members of the town and parish aforesaid, viz. at the town and parish aforesaid: and that then there were and are now within the said town and parish and among the members thereof parties disagreeing among themselves, and mutually promoting contrary interests to one another: that the defendant being then and still one other of the assistants of the said town and parish, intending the free election of a mayor then next to be made, and the free election of other members of the said town and parish, then soon to be made, to disturb, and to raise confusion in the government of the

Intr. Pasch. 10
Geo. n. 17.

'Tis criminal to promise money for his vote to any man who has a vote in the election of the members of a corporation.
vide Burr. 2494-8 Mod. 186.

Upon a prosecution for the offence 'tis sufficient to allege generally that the party to whom the promise was made had a right to

vote: it is not necessary to set out the clauses of the corporation charter which enable him.

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town and parish aforesaid, a little before *Tuesday* next after *St. Bartholomew* (that day being the day appointed by the said letters patent for electing the mayor) and upon and about which day the election of the other members of the said town and parish was then intended to be made, *scilicet* 10 *Augusti* 10 *Geo.* apud villam et parochiam praedictam nequiter aduifate et corrupte tentavit instigavit urgebat et sollicitavit praedictum *Willielmum Hewett*, then and there being one of the assistants of the said town and parish, and having a vote in the election of the mayor of the said town and parish, and also in the election of the other members of the said town and parish soon to be chosen, *suffragium suum ad electionem majoris villae et parochiae praedictae adtunc proxime fiendam, ac in electione aliorum membrorum villae et parochiae praedictae tunc cito eligendorum, dare pro et in interesse adtunc promotum* within the said town and parish as well by the said defendant as the said *John Upcott*: and to persuade and promise the said *William Hewett* to give his vote in *electione* illa for and in that interest, the defendant then and there unlawfully and corruptly promised, to pay the said *William Hewett* 500 *l.* upon condition that he would give his vote *ad electionem illam pro et in interesse illo; in magnam obstructionem liberae et pacificae electionis majoris et aliorum membrorum villae et parochiae praedictae, et in incitationem confusionis in eadem et subversionem boni regiminis et gubernationis villae et parochiae illius, et magnam violationem libertatis et privilegiorum inhabitantium ejusdem, &c.* Upon not guilty pleaded, the defendant was found guilty. And *Sir Thomas Pengelly* the king's serjeant moved in arrest of judgment, that by so much of the charter as was set out in the information it did not appear, that the defendant or *Hewett* as assistants had a right to vote at any election but of that of a mayor; and if there are any clauses in the charter, which enable assistants to vote at the election of other officers, they should have been set out; for want of which it is informal; and it is not sufficient to aver, that *Hewett* had a right to vote at the election of the other members of the corporation; but the offence charged is, for soliciting *Hewett* to vote, not only at the election of a mayor, but also of the other members; which is laid as one intire offence, and the fine must be for the whole; but it ought not to be for soliciting *Hewett* to vote at the elections of the other members, because he had no right to vote at them. Then serjeant *Pengelly* urged, here was no offence at all charged; for it is lawful for one member of a corporation to ask or persuade another to vote for his friend, and if he made such a promise as in this information, it will be no crime, without shewing the fact done, that the money was paid, and accepted by *Hewett*. Besides the election of the other members might be only of common-council-men, who are not magistrates,

brates, but only in the nature of private persons: and in such case the offer of money to vote for them would be no offence punishable by information. Inticing an apprentice to leave his master's service is not indictable: 1 Salk. 380. the *King v. Daniel*. And the promise here is void, because there is no good consideration for it. But the court were of opinion, that to bribe persons, either by giving money or promises, to vote at elections of members of corporations, which are created for the sake of publick government, is an offence for which an information will lie, and that *Hewitt's* right to vote was sufficiently laid. And judgment was given against the defendant.

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The King *vers.* Sympson.

S. C. Str. 609.

A Mandamus issued out of this court directed to Dr. King archdeacon of Colchester in Essex, to the defendant his surrogate, *aut alii judici in hac parte competenti*, commanding him to swear Mr. Rodney Fane one of the churchwardens of the parish church of All Saints in Colchester. To which the defendant returned, that before the writ came to him, and before the writ issued, viz. 20 April last, the bishop of London inhibited the said Dr. King then and yet archdeacon of Colchester, *cujus minister et officarius* the defendant Barnaby Sympson *adunc fuit et adhuc est, ab ulterius procedendo de vel in re sive negotio praedicto, et perinde totam jurisdictionem in ea parte super se suscepit; quodque inhibiti praedicta adhuc remanet in suo vigore et virtute, et his de causis* the said Rodney Fane into the said office, &c. *admittere et jurare non potest nec debet prout per breve praedictum praecipitur.* Mr. Reeve took exception to this return, that it is not averred, that Colchester is within the diocese of London; for if it is not, the bishop's inhibition is void; and the court cannot judicially take notice, that Colchester is within the diocese of London. *Quod fuit concessum per curiam*, and a peremptory mandamus was granted November 16.

The court cannot take notice ex officio in what particular diocese a particular town lies.

The King *vers.* White.

S. C. 3 Mod. 325.

TO a mandamus directed to the archdeacon, to swear a churchwarden, he returned *non fuit electus*; upon opening which Mr. justice Fortescue said, that it was settled, and had been often ruled, that the archdeacon could not judge of the election, and therefore this return was ill. Whereupon a peremptory mandamus was granted. But note, it was certainly wrong, for the return was a good return, and has often been made made to such

On a mandamus to the ecclesiastical officer to swear in a person elected churchwarden, the officer cannot return that the person he is commanded to swear in was not elected. R. cont. vide *Fitzg.* 195.

Salk. 433. pl. 14. Semb. cont. post 1405. D. cont. 1 Bernard. B. R. 412. ante 138, 1008. Burr. 1328.

manda-

REX
v.
WHITE.

mandamus, and actions brought upon the return, and tried: *vide post*, the *King v. Harwood*, 1405.

Memorandum, January 1724-5, *The earl of Macclesfield* surrendered the great seal into his majesty's hands, who was pleased to deliver it in council at St. James's the 7th day of January to Sir Joseph Jekyll master of the Rolls, Mr. baron Gilbert, and myself, where we took our oaths of office as lords commissioners of the great seal.

Note, *All Hilary term 1724-5, I attended in Chancery as one of the commissioners of the great seal.*

The King was Symphon.

Easter Term

11 Georgii Regis, B. R. 1725.

Memorandum, That Sir John Pratt knight, chief justice of the king's bench, died Wednesday February the 24th last past, and I was created chief justice in his place by a writ bearing teste March 2. and was sworn into the office March 3. following before Sir Joseph Jekyll knight, master of the Rolls, and Sir Jeffery Gilbert knight, one of the barons of the Exchequer, then two of the lords commissioners for the custody of the great seal, at the Rolls; notwithstanding which I continued one of the commissioners of the great seal. And James Reynolds esquire, serjeant at law, was sworn at the Rolls one of the judges of this court in my place, before the three lords commissioners of the great seal, after his return from the Western circuit.

**William Maddox and Robert Godfrey vers.
John Taylor and others.**

S. C. 8 Mod. 370.

THE plaintiffs brought an action of trespass against the defendants, and declared, that the defendants the 24th of May, 8 Geo. at Ighsam in Kent, clausum domum et horreum ipsius Willielmi Maddox fregerunt et intraverunt, ac diversa bona et catalla ipsorum Willielmi Maddox et Roberti Godfrey, viz. unam vaccam, and several others particularly mentioned in the declaration, adtunc et ibidem ceperunt et asportaverunt, &c. On not guilty pleaded, the jury found a verdict for the plaintiffs against all the defendants, and gave them 20*l.* 9*s.* damages besides costs. And Hilary term 10 Geo. 1723, Mr. Fazakerley moved in arrest of judgment, that the two plaintiffs had joined in an action of trespass for breaking and entring the clotes, house and barn to which one of them, viz. Robert Godfrey had no title; and

In an action by several, if any of the charges appear to have injured some of the plaintiffs only, and intire damages are given, the judgment shall be arrested.

MADDOX
v.
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and by consequence, if judgment should be given for the plaintiffs, *Godfrey* would recover damages for breaking the house, &c. to which he had no right, and had sustained no damage by the breaking and entry thereof. Of which opinion the lord chief justice *Pratt* and the other judges seemed to be, and therefore a rule was made, to stay the judgment, till it should be moved by the plaintiffs. And afterwards it being moved this term *May* the 7th, myself and my brothers *Powys* and *Fortescue* being clear of that opinion, judgment was arrested absolutely, *absente Reynolds*.

Steed *vers.* Layner.

Notice must be given of the execution of a writ of scire fieri inquiry.
S. C. Str. 623.
8 Mod. 307.
R. acc. Str. 135.
Gilb. Law and Equity 95.
Pract. Reg. C.B. 379. Cooke 1.
But notice need not be given of the execution of an elegit, or an extent.

THE execution of a writ of *scire fieri* inquiry was set aside, upon a motion of my brother *Whitaker*, because no notice was given of the time the writ was to be executed, for which purpose it is necessary to give notice; and so it was held before in the like case, *Trin. 9 Geo. B. R.* and an inquisition took on such a writ set aside. And it is not like executions by *elegit*, or on extents, in which cases notice is not usually given.

Intr. Mich. 11
Geo. B. R. Rot.
200. Error. C.B.
Damages cannot be recovered in an action for any matter which occurred after the commencement of the action.
R. acc. 1 Vent. 103. 2 Saund. 169. ante 329.
See vide Hob. 224. Com. 331.
Str. 1095 Burr. 1077.
Where intire damages are given if judgment cannot be given for the whole, it shall be arrested. R. acc. ante 329.
1372, 1381.
vide Dougl. 696.

Baker *vers.* Bache.

THE plaintiff brought an action on the case against the defendant for money laid out and necessities provided by the plaintiff for the defendant's sons, to whom the plaintiff was by the defendant appointed their tutor, &c. and the plaintiff laid the promise to be made by the defendant to the plaintiff 19 June 1718. to pay the plaintiff for the necessities he should provide for the sons, and the money he should lay out for them, &c. and avers he continued their tutor for five years and nine months, and during that time found them necessities, &c. which came to 140*l.* Judgment was given against the defendant by *nil dicit in C. B.* and the writ of inquiry was executed the 3d of February 10 Geo. 1723. and the inquisition found, that the plaintiff sustained damages *occasione praemissorum ultra missa et custagia* 129*l.* 9*s.* and 11*d.* And final judgment being given for the plaintiff in the common pleas, the defendant brought a writ of error in the king's bench. And Monday May 3. this term the judgment of the common pleas was reversed, because the jury on the writ of inquiry have given damages for necessities provided after the action commenced, and to a time after the writ of inquiry was executed; for

for the promise being laid to have been made the nineteenth of *June* 1718. and that the plaintiff had provided the necessities, &c. from that time for five years and nine months next following; that time did not expire till the nineteenth of *March* 1723. computing calendar months, and not till about the 25th or 26th of *February*, computing lunar months.

BAKER
v.
BACNE.

Brace *vers.* Daniel. Error C. B.

T Respafs *vi et armis* for taking and detaining the plaintiff's cattle. The plaintiff declared, that the defendant *Samuel Daniel*, *March* 20, 1718. *vi et armis* at *Averton* in *Essex*, *ceperunt, abduxerunt et asportaverunt* a mare, a bull, &c. of the plaintiff's. After judgment by *nil dicit* a writ of inquiry was executed, and damages found for the plaintiff, and final judgment given for him. Upon which the defendant *Daniel* brought a writ of error in the king's bench, and the judgment was reversed *May* 7 this term; because the verbs being in the plural number, there was no positive charge that the defendant took the cattle.

John Mayne *vers.* Daniel Harvey.

IN an *indebitatus assumpsit*, and *quantum meruit*, for goods sold and delivered by the plaintiff to the defendant; the defendant pleaded, that the plaintiff *actionem suam inde habere seu manutenere versus eum non debet*, and then set out the act of parliament of the ninth of the king, c. 28. intituled an act for more effectual execution of justice in a pretended privileged place in the parish of *St. George* in the county of *Surry*, commonly called the *Mint*, and then brings himself within the benefit of that act. And on demurrer *April* 21 in this term judgment was given for the plaintiff, because this plea cannot be pleaded in bar of the action, but only in bar of the execution. *Mr. Martin* counsel for the plaintiff.

The mint act was not pleadable in bar of any action: it could only be pleaded in bar of the execution thereon.

Intr. Mich.
11 Geo. B. R.
Rot. 291.

Robert Kerry and Mary his wife, formerly wife of Robert Allfounder, *against* William Kent and others.

Nothing can be recovered in dower by the description of a tenement. S. C. Str. 625.
3 Mod. 355.
Vide Str. 834.
3 Wils. 23.
3 Leon. 228.
Cro. Jac. 621.
but see also
1 T. R. 11 Burr. 629. 2672.

And a judgment in dower for a tenement is erroneous. S. C. Str. 625. 3 Mod. 355.

And shall be reversed tho' the tenant confessed the action. S. C. 3 Mod. 355.

And the sheriff delivered seisin.

ERROR upon a judgment given on a writ of *dower*, brought by the demandants, wherein the demandant *Mary* demanded her dower of fifteen acres of land, three messuages, three tenements, a brewhouse, &c. in *Debenham* and *Winston* in *Suffolk*, as being formerly wife of *Robert Allfounder*, &c. The tenants confessed the action, and pleaded, that from the time of the death of *Robert Allfounder* they always were, and yet are ready to render the demandant *Mary* her dower. Whereupon judgment was given for the demandants to recover seisin of one third part of the said fifteen acres of land, three messuages, three tenements, &c. and a writ of seisin issued returnable *March 15.* and a writ of inquiry of damages, to inquire what damages the demandants had sustained by reason of the detaining the dower from the day of suing the original writ to the issuing the writ of inquiry, returnable *March 15.* To which the sheriff returned, he had delivered seisin of one third of the land, messuages, tenements, &c. and he also returned an inquisition, finding that the demandants had sustained damages by the detaining of the dower from the day of suing the original writ to the issuing of the writ of inquiry 30*l.* 1*s.* besides costs, for which and costs judgment was entered for the demandants. And now upon a writ of error brought in the king's bench serjeant *Comyns* for the plaintiff in error insisted, that a writ of dower would not lie of a tenement, it being a word of an uncertain signification, and therefore the sheriff could not give seisin of it. Secondly, that the judgment for the recovery of damages was erroneous; first, because by the statute of *Merton*, 20 H. 3. c. 1. the demandant in dower is not to recover damages, unless her husband died seised; and upon this record it does not appear, the husband died seised; *Co. Lit.* 32. b. secondly, the tenants have pleaded, they always were ready, and yet are ready to render the dower, in which case they shall answer no damages. Mr. *Reeve* for the demandants in dower and the defendants in the writ of error insisted, that the plea of *touts temps prisi*, &c. can be only pleaded by the heir in bar of damages, *Co. Lit.* 32, 33. and it does not appear, that any of the tenants was heir at law, and therefore this plea in this case could not prevent the demandants from recovering damages. He admitted, that the judgment for the damages could not be maintained, because it was not suggested, that the husband died seised; but yet he

he said, the (a) judgment might be reversed as to that, and be affirmed as to the dower, if the demand was rightly made. For the judgment for the damages was founded on the statute of *Merton*, and the judgment for the dower is a judgment at common law; and therefore though the judgment for the damages should be reversed, yet the judgment for the dower might stand. And he compared it to *Specot's* case, 5 Co. 58, 59. where in a *quare impedit* judgment for the recovery of the presentation was affirmed, though there was an error in the judgment for the recovery of the damages. Then Mr. *Reeve* insisted, that a writ of a third part *trium tenementorum* was good in dower (where the same certainty is not required as in other writs) and therefore a demand of dower *de libero tenemento* is good. *F. N. B.* 148. *H.* So an assise or writ of dower lies of a croft or cottage, 8 Hen. 6. 3. *Bro. Dower* 92. and yet a *præcipe* does not lie of a cottage; and if this declaration had been ill on a demurrer, yet now the tenants have confessed this demand as laid, and therefore that makes the count good; like the case of *Slack v. Bowfal*, *Cro. Jac.* 668. the plaintiff declared, that the defendant being indebted to the plaintiff in 5*l.* *pro redditu antetunc debito*, promised to pay the 5*l.* when requested, &c. the defendant pleaded payment, and on issue joined a verdict against the defendant; and the court held the declaration was made good by this plea of payment, though it was not shewn, when the rent became due, nor for what term, nor upon what contract. So *Cro. Jac.* 682. *Buckland v. Otely*, debt for rent upon a demise of lands at *Creek*, and of several other closes, and did not shew where those closes lay; the defendant pleaded, the plaintiff had entered into part of the lands at *Creek*, &c. and on issue thereupon verdict for the plaintiff; and the court held this plea of collateral matter had aided this omission in the declaration, which would have been good cause of demurrer.

But the court was of opinion, that this declaration was so uncertain, that the confession could not help it; because the sheriff could not tell of what he was to give seisin; for these tenements might be houses or lands, or any thing else that might be held; and therefore the case cited by Mr. *Reeve* does not come up to the present case. And judgment was reversed for this reason, *Moy* 4. and no opinion given as to the other points made by him. See *Cro. Jac.* 621. *Herward v. Cowndish*.

KERRY
v.
KENT.

(a) Vide ante
897. and the
cases there cited.

The King *vers.* John Tucke.

S. C. but rather differently reported 2 Mod. 366.

If a statute varies the punishment of a particular offence according to the rank and age of the offender, if the information in a conviction states his rank and age, and the evidence refers to the person mentioned in the information it need not shew his rank or age. Vide Dougl. 332.

THE defendant Tucke was convicted upon the statute of (a) 6 & 7 W. 3. c. 11. for profane cursing and swearing, by Mr. Tuthill a justice of peace for *Axbridge* in *Somersetshire*. The conviction being removed by *certiorari* into this court set out, that the 20th of July 10th of the king, John Flower of the said town and parish of *Axbridge* comes before the said justice of the peace, and informs him, that John Tucke of the said town and parish of *Axbridge*, then or at any time after *non existens servus, nec laborator, nec miles communis, Anglice* a common soldier, *nec nauta, Anglice* a common seaman, *sed adtunc existens generosus et ultra aetatem sexdecim annorum*, within ten days then last past, viz. the said 20th of July, at the town and parish aforesaid, did profanely swear four profane oaths, and sets them out; *contra formam statuti in hujusmodi casu nuper editi et provisi, et superinde praedictus Johannes Flower, adtunc et adhuc existens credibilis testis, postea, scilicet 27th of the same July*, in his proper person comes before me the said John Tuthill, then being a justice of the peace, &c. *et sacramentum suum corporale super sacrosancta Dei evangelia ad dicendum veritatem de et super praemissis praedictis in informatione praedicta superius praestat* before me the said justice, &c. *praedictusque Johannes Flower sic juratus existens dicit deponit et jurat super sacramentum suum praedictum de et super praemissis praedictis in informatione praedicta superius specificatis*, that the said John Tucke the said 20th day of July at the town and parish aforesaid, did then and there profanely swear four profane oaths, and sets them out, *contra formam statuti in hujusmodi casu editi et provisi: super quo praedictus Johannes Tucke post summonitionem ei ad respondendum de et super praemissis praedictis in informatione contentis prius in hac parte debito modo factam, postea, scilicet the said 27th day of July at the town and parish aforesaid, before me the said John Tuthill then being a justice, &c. comes in his proper person, ac omnibus et singulis materiis in informatione praedicta contentis et evidentiis praedictis superinde datis per praedictum Johannem Tucke auditis et plene intellectis existentibus, idem Johannes Tucke per me praefatum iudiciarium allocutus est, quomodo se vellet de et in materiis praedictis in informatione praedicta versus cum objectis et specificatis defendere et acquiescere, et siquid pro se habeat vel dicere sciat, quare ipse idem Johannes Tucke de praemissis praedictis in informatione praedicta contentis, et ei in forma praedicta superius impositis, non convincatur; et quia per me praefatum iudiciarium auditis et plene intellectis omnibus et singulis per ipsum Johannem Tucke in defensione sua de et super praemissis*

(a) Vide 19 G. 2. c. 21.

in informatione praedicta superius allegatis, manifeste mihi praefato justiciario constat, praedictum Johannem Tucke esse culpabilem de praemissis praedictis in informatione praedicta specificatis et ei impositis modo et forma prout in et per informationem praedictam superius allegatur; ideo consideratum est per me praefatum justiciarium, quod praedictus Johannes Tucke per testimonium praefati Johannis Flower credibilis testis super sacramentum suum praedictum coram me praefato justiciario ut praefertur praescriptum de praemissis praedictis in informatione praedicta specificatis et ei ut praefertur impositis, convincatur et convictus sit secundum formam statuti in hujusmodi casu editi et provisus; et quod praedictus Johannes Tucke sorisfaciat summam octo solidorum pro offensis suis praedictis, scilicet duos solidos pro quolibet offenso praedicto, levandam et solvendam secundum formam statuti praedicti in hujusmodi casu editi et provisus; in cujus rei testimonium ego praefatus Johannes Tuthill generosus justiciarius praedictus huic recorde manum meum et sigillum meum apposui, apud villam et parochiam praedictam, dicto vicesimo septimo die Julii, anno regni dicti domini regis nunc decimo supradicto.

Mr. Fazakerley for the defendant took two exceptions to this conviction: first, that it did not appear, of what degree the defendant was, for the statute of 6 & 7 W. 3. c. 11. makes a difference in the punishment according to the degree of the offender; for a servant, labourer, common soldier, or common seaman, for the first offence is, if convicted, to pay one shilling, every other person for the first offence two shillings; second exception, it did not appear of what age the defendant was, for if he was above sixteen, if he did not pay the money, and no distress was to be found, he was to be set in the stocks; if under sixteen, in such case he is to be whipt: now although in the information set out in the conviction John Flower informs the justice, that the defendant was not a servant, nor labourer, nor common soldier, nor common seaman, but a gentleman, and above sixteen years of age; yet that was not proved by the evidence given by the witness as set out in the information, which he insisted it ought to be; as in conviction for deer-stealing, the county where the offence was committed was only mentioned in the information, and not in the evidence of the witness; and therefore that not appearing to be proved, the conviction was quashed. But the court were of opinion, that since it was alleged in the information, that the defendant *non existens servus, nec laborator, nec miles communis, nec nauta, sed adtunc existens generosus et ultra aetatem sexdecim annorum, &c.* and the witness swore, that praedictus Johannes Tucke did swear, &c. that was sufficient, and much different from the case of the conviction of deer-stealing; for here the person as described in the information is described by the praedictus, but in that case the justices of the peace have no jurisdiction, unless it is proved to be com-

The evidence in a conviction for deer stealing must shew in what county the offence was committed.

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mitted in their county; and mentioning the county in the information, without proving it, is not sufficient. And the conviction was confirmed, *nisi*, &c. and no cause was afterwards shewn, April 21, 1725.

Int. Pasch.
8 Geo. B. R.
Rot. 243.

Phillibrown against Ryland and others.

Q. Whether a man who has a right to be present at a vestry can maintain an action against one who keeps him out of the room in which a vestry is holding. (a)

If such an action will lie the declaration must shew that the parishioners had a right to hold their vestry in the room out of which the plaintiff was kept. S. C. Str. 624. 8 Mod. 351.

An allegation that the room was the usual place in which vestries were wont to be held is not sufficient to shew that the parishioners had a right to hold their vestries in it.

CASE. The plaintiff declares, that 11 July 1721, and long before and always from that time *hucusque*, he was and now is an inhabitant and parishioner paying scot and bearing lot in the parish of St. Botolph Bishopsgate in the ward of Bishopsgate, London, and as such inhabitant and parishioner he the said plaintiff *jus et privilegium habet et habere debuit et debet conveniendi et praesens existendi ad consulendum tractandum et deliberandum, et votum et suffragium suum dandum*, in every vestry of the inhabitants and parishioners of that parish held and to be held for, in and within the said parish, *pro de et concernente res materias et negotia publica spectantia et pertinentia ad sive tangentia reparationem ecclesiae parochialis praedictae, aut monetam collectam seu colligendam, levatam seu levandam, ac ratas assessoria vel taxationes facta seu facienda pro tali reparatione, aut pro de et concernente aliquas alias res materias et negotia in vel per talem assemblationem aut congregationem negotianda transigenda sive ordinanda spectantia et pertinentia ad sive tangentia commodum et bonum publicum parochiae praedictae, vel pro de et concernente aliqua alia res materias et negotia parochialia, quae in vel per talem assemblationem aut congregationem negotiari transigi seu ordinari solent et debent*: and whereas a vestry of the inhabitants and parishioners of the said parish was held the said 11th of July in quodam loco vocato *romes vestiaria*, *Anglice* the vestry room *prope* adjuncte to the said parish-church *existente usuali loco ubi tales assemblationes aut congregationes teneri et haberi solitae et consuetae fuerunt, viz. apud London praedictum, in parochia et warda praedictis; et adtunc et ibidem diversi inhabitantes et parochiani dictae parochiae parochialiter convenerunt et praesentes fuerunt, Anglice, a vestry was held, secundum notitiam eis inde prius datam, ad consulendum, tractandum et deliberandum, et vota et suffragia sua dandum pro de et concernentia diversa publica res materias et negotia spectantia et pertinentia ad sive tangentia reparationem ecclesiae praedictae ac commodum et bonum publicum parochiae praedictae*; and that the said Thomas Phillibrown then and there being an inhabitant and parishioner of the said parish, paying scot and bearing lot as aforesaid, *paratus fuit et seipsum obtulit, durante assemblatione aut congregatione illa, intrare in praedictum locum voca*

(a) According to the report in Str. 624. the court made no difficulty but that the action was maintainable, and according to the report in 8 Mod. 351. Raymond Ch. J. and Reynolds J. declared themselves of that opinion.

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tum romeam vestriam, where the said vestry was then held, ^{PHILLIBOWN}
ad consulendum, tractandum et deliberandum, et votum et suf-
fragium sua dandum in assemblatione aut congregatione illa, de et
concernentia res materias et negotia parochialia, quae ibidem tum
transacta et tractata fuerunt aut forent; but the defendants
praemissa praedicta bene scientes, sed machinantes et intendentes,
the said T. P. in ea parte damnificare, et de jure et privilegio
suis de et in praemissis praedictis impedire et totaliter frustrare et
deprivare the said T. P. e loco praedicto where the said vestry
 was held, *excluserunt et extraherunt*, that they the said
T. P. in eundem locum durante assemblatione aut congregatione
illa intrare adtunc et ibidem obstruxerunt et penitus recusaverunt,
ac ostium loci illius versus ipsum T. P. occluserunt, et praedictum
ostium sic oclusum diu, scilicet per spatium duarum horarum, con-
tinuaverunt; per quod the said T. P. ex eadem assemblatione
 aut congregatione parochiali penitus exclusus fuit, et consulere,
 tractare vel deliberare, aut votum et suffragia sua ibidem dare,
 dum diversa publica res materia et negotia spectantia et pertinē-
 tia ad sive tangentia reparationem ecclesiae praedictae, ac com-
 modum et bonum publicae parochiae praedictae per alios inhabitant-
 es et parochianos, sic ut praesertur parochialiter conventos et
 praesentes existentes, negotiata transacta et ordinata fuerunt,
 absque aliqua legitima causa totaliter impeditus fuit. Then there
 was another count for keeping the plaintiff out of a vestry
 held the 15th of August 1721, in the same manner; da-
 mages 50*l.* To this declaration the defendant demurred,
 and shewed for cause of demurrer, that it did not appear by
 the declaration, that the plaintiff was damnified in any man-
 ner, and that the declaration was uncertain, doubtful, and
 wanted form. The plaintiff joined in demurrer. Serjeant
Branthwaite for the defendant insisted, that this action could
 not be maintained, because vestries are voluntary meetings
 of parishioners only, and looked on in law as such, and
 therefore it was neither an injury or damage to the plaintiff,
 to keep him out of such a meeting of the parishioners. In
 the next place, if shutting the door, and keeping the plain-
 tiff out, was a damage, it was no more than a publick da-
 mage, for which no action on the case would lie; but to
 maintain such an action, there ought to be a particular
 damage; as if a common highway is stopped, every person
 that goes that way receives a damage by the obstruction;
 but yet because the damage is common to all persons passing
 that way, no (a) one can maintain an action on the case for
 it, unless he suffers some damage particular to himself.
 5 Co. 73. *Williams's case*; Co. Lit. 56. Cro. Jac. 446.
Fowler against Saunders, Noy 120. So *Williams's case*,
 5 Co. 72. was an action brought by the lord of the ma-
 nor against a vicar, for not celebrating divine service in his
 chapel in his manor, and it was laid, that the vicar and
 all his predecessors time out of mind had used to celebrate
 divine service in that chapel, and to administer the sacrament,

RYLAND.

(a) Acc. ante
 486. and see the
 books there
 cited.

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to the plaintiff and his ancestors, &c. *ac hominibus servientibus et tenentibus suis*; and held the action would not lie, because by the same reason as the lord might have an action, every tenant might have an action, and so an infinite number of actions for one default. So *Cro. Jac.* 268. *Ford v. Hoskins*, case will not lie against a lord of a manor, for refusing to admit a copyholder, by the person to be admitted. Nor does an action lie against the owner of a common ferry-boat, for refusing to let a person pass, *Payne v. Partridge*, *Salk.* 12. 3 *Mod.* 289. 1 *Show.* 243, 255. *Comb.* 180. *Carth.* 191. *Holt* 6. *post vol.* 3. p. 293. (a) unless he receives some particular damage thereby. And if such suits as these should be allowed, it would occasion a multiplicity of actions, which the law always discountenances. Secondly, he insisted, that if an action of such a nature would lie, yet the plaintiff has not sufficiently intitled himself to it; because it does not appear by the declaration, that the parishioners had a right to hold their vestries in this room; for notwithstanding any thing alleged therein, the room might be a part of the defendant's house; and it is not alleged, that the parishioners used time out of mind to meet in this room, and hold their vestries there.

Mr. *Bowes* for the plaintiff insisted, that the inhabitants of a parish paying scot and lot might assemble in vestry, and make rates; and every such inhabitant had a right to be present at such meetings, and give his vote. In 5 *Co.* 63. it is argued by the counsel, and not denied by the court, that inhabitants of a *village* without any custom may make by-laws for repairs of the church, or of a highway, or of any such thing, which is for the publick good. See 44 *Ed.* 3. 19. And to this purpose they are a corporation. 1 *Mod.* 194. *Rogers v. Doornant.* 2 *Mod.* 8. 5 *Co.* 67. *Jeffery's* case. The church-wardens ought to summon the parishioners to meet and make a rate for the repair of the church, and that need not be from house to house, but a general publick summons at church is sufficient. 1 *Mod.* 236. and the case of *St. Mary Magdalen Bermondsey.* 2 *Mod.* 222. *Gibb. Codex* 220. 1 *Salk.* 165. The parishioners have a right to chuse officers, as by custom church-wardens, 5 *Mod.* 325. *Salk.* 166. and those parishioners that have a right to elect, have a right to be at the meeting, which is the vestry. That an action should therefore lie, for obstructing and hindering the parishioners from being present at such an assembly, falls within the reason of the case of *Abby and White*, *ante* 938. And an information or indictment will not lie, as in case of a common nuisance. Secondly, as to the exception to the declaration he argued, it was well enough, because it is laid that this room was the usual place where such assemblies

(a) The case of *Payne v. Partridge* was an action for not keeping a ferry boat; not an action for refusing to let the plaintiff pass.

generi et haberi solent et consuetae fuerunt, and that the parishioners were then there assembled; and if it was the defendant's room, yet if he had let it out for the parishioners to hold their vestry in, he could not shut the door against any of them; and that there was no occasion to lay an express custom for all the parishioners, for if their vestry was a select vestry (if by law there can be any such) the defendant ought to have pleaded it; though he looked upon it that select vestries were only encroachments. Whether the action would lie or not, if the declaration had been good, the court came to no resolution. And judge *Fortescue* seemed to be strong in opinion, that the action would not lie. But as to the declaration, the court was unanimous, that it was ill; because it is not shewn, the parishioners had a right to hold their vestry in this room; for in actions of this nature the plaintiff must shew a right in the thing claimed, and then a disturbance. And for this reason judgment was given for the defendant, April 27, 1725.

PHILLIBROWN
v.
RYLAND.

John Burland against Jo. Tyler and Mary his wife.

THE plaintiff as administrator of *Jo. Burland* brought an action of debt in the *debet et detinet* upon two several bonds entered into by *John Hobbs* deceased, by which he bound him and his heirs, to whom the defendant *Mary* was daughter and heir. The defendants prayed *oyer* of the bonds and the conditions; the first bond was dated 21 December 1704, of the penalty of 400*l.* with condition, that *Jo. Hobbs* should pay 103*l.* to one *Nath. Brewer*, for payment whereof the intestate and *Jo. Hobbs* were bound in a bond of 200*l.* penalty to the said *Jo. Brewer*, but for the debt of the said *Jo. Hobbs*; the other bond was dated 17th of September 1712, of the penalty of 300*l.* with condition, that *Jo. Hobbs* should pay *David Yea* 103*l.* the debt of the said *Jo. Hobbs*, for payment whereof the said *Jo. Hobbs* and the intestate were bound in a bond of 200*l.* penalty to the said *David Yea*: after which the defendants, *protestando* that the several sums were paid to the said *J. Brewer* and *David Yea*, according to the several conditions of the said bonds, pleaded, that the defendant *Mary* *nec habet aliqua terras sive tenementa per haereditarium descensum de praedicto Jo. Hobbs patre suo in feodo simplici, neque habuit die impetrationis billae praedictae, nec unquam postea, praeter unum mesuagium cum pertinentiis in Storgursey praedicto, omnia et singula quae praemissa non valent in toto centum et quadraginta libras*: then they farther plead, that the said *Jo. Hobbs* the father, in his life by his obligatory writing being lawfully indebted became bound to one *William Clark* in 140*l.* and so being indebted died, that debt to the said *William Clark* not being paid; whereupon one *Mar-*

No objection can be taken except on a special demurrer because an action is brought in the *debet et detinet* which ought to have been brought in the *detinet* only. S. C. 8 Mod. 356. vide 1 Sid. 342. pl. 6. 1 Lev. 224.

An executor cannot properly sue as such in the *debet et detinet*. S. C. 8 Mod. 356. R. acc. ante 698. post 1513. D. acc. 5 Co. 51. b.

An heir may be sued in the *debet et detinet*. R. acc. 1 Sid. 342. Agr. 5 Co. 36. a. D. acc. Plowd. 441. Semb. acc. 1 Lev. 224.

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garet Hobbs, widow of the said *Jo. Hobbs*, mother and guardian of the said *Mary*, paid the said debt of the said *Jo. Hobbs* to the said *William Clark*, and that that payment was made by the said *Margaret* as guardian of the said *Mary*, and while the said *Mary* was under the age of twenty-one years; and that neither the said *Jo. Tyler* nor *Mary* his wife, nor the said *Margaret*, nor any of them, had any notice, nor ever knew of the bonds mentioned in the declaration, nor either of them, from the said *Burland* the intestate, nor from the plaintiff, nor from any other person whatsoever, before the payment of the said bond of the said *Jo. Hobbs* as aforesaid made by the said *Margaret* to the said *William Clark*; and therefore pray judgment, if they *de debito prædicto virtute scripti obligatorii prædicti onerari debeant*. To this plea the plaintiff demurred generally, and the defendants joined in demurrer.

Mr. *Top* for the defendants, offered nothing to maintain the plea, but admitted that to be ill; but insisted the declaration was naught, because the action was brought by the plaintiff as administrator in the *debet* and *detinet*, whereas it is laid down as a rule in 5 Co. 31. b. *Hargrave's* case, that in all cases where executors are forced to name themselves executors in actions brought by them, the writ shall be in the *detinet* only; because the thing or damages recovered shall be *assets*. So debt for an escape brought by an administrator for escape in the life of the intestate must be in the *detinet* only, *Stiles* 232, *Martin* against *Hendlye*, because the plaintiff does not recover to his own use. *Cr. Jac.* 545. *Sir Geo. Reynell* against *Lanycastle*; held that bringing an action by an executor in the *debet* and *detinet* where it ought to be in the *detinet* only, is not matter of form only, but a fault in substance after a verdict, and not aided by the statute of 18 El. c. 14.

Serjeant *Chapple* for the plaintiff said, in respect of the debt of the heir, the action was rightly brought; for as to her it ought to be in the *debet* and *detinet*, because it is brought upon the *lien* by which the heir is bound, and is not brought against her *en autre droit*, as if the defendant had been an executor. And yet if such an action is brought against an heir in the *detinet* only, yet after verdict for the plaintiff that would be cured by 16 & 17 Car. 2. c. 8. Then in respect of the plaintiff's being an administrator, if an administrator brings an action in the *debet* and *detinet*, where it ought to be in the *detinet* only, after a verdict that is helped by the same statute. 1 Lev. 250. *Frewin et ux. v. Paynton*. 1 Sid. 379. And by the same reason he said, it would be good by the statute for amendment of the law, 4 Ann. c. 16. s. 1. the defendant not having demurred specially, and assigned this cause of his demurrer.

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The court were of opinion, that this would have been ill upon a general demurrer before the statute made for the amendment of the law; but since that statute, they all agreed, that an action brought as this is, would be good upon a general demurrer; and that in this case the defendant having pleaded in bar, and not having taken advantage by demurring specially, and shewing it for cause, it was well enough. That it would be good after a verdict by the 16 & 17 Car. 2. c. 8. the case cited 1 Lev. 250. is express; and yet this is none of the defects particularly mentioned in that statute, but came under the words [all other matters of the like nature not being against the right of the matter of the suit.] Then that resolution has determined, that this defect is not against the right of the matter of the suit, but is of the like nature with the omission of a *proferit in curia* of a bond or indenture, and the other things mentioned particularly in that statute of 16 & 17 Car. 2. c. 8. Then comes the act of 4 Anne c. 16. s. 1. for amendment of the law, and enacts, that notwithstanding many of the same defects (specifying them) mentioned in the act of 16 & 17 Car. 2. c. 8. the court should proceed to give judgment according to the very right of the cause, without regarding any such defects, or any other of like nature, except the same shall be specially shewn for cause of demurrer. This defect then not being against the right of the suit, as was adjudged in that case of 1 Lev. 250. ought to be shewn specially for cause of demurrer, if the party would take advantage of it. Besides, the act for the amendment of the law takes notice, that a defect in matter of substance should not be took advantage of without a special demurrer; for it enacts, that the court shall proceed to give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any defect, &c. except, &c. notwithstanding such defect, &c. might have been heretofore taken to be matter of substance, and not aided by the 27 Eliz. c. 5. so as sufficient matter appear by the pleadings, upon which the court may give judgment according to the very right of the cause. Now here it appears, the plaintiff has a right to recover, and to recover as administrator, and what is recovered will be *assets*. And judgment was given for the plaintiff, 7 May 1725.

The King *vers.* Sheringbrook.

An order for an appointing an overseer of the poor must shew that the person appointed is a substantial householder. R. acc. Str. 1261.

Vide Burn's Poor Overseers. 14th ed. vol. 3. p. 320.

AN order of justices of the peace, made for appointing the defendant overseer of the poor, being removed into this court by *certiorari*, was quashed upon motion, because it did not appear by the order, that the defendant *Sheringbrook* was a substantial householder, which is expressly required by the words of the act 43 *Eliz. c. 2*.

The King *vers.* Shearing.

Vide ante 1368.
but see also
4 G. 3. c. 26.

THE defendant was indicted for a trespass in taking *vi et armis tres juvencae, Anglice yearlings, coloris brown, &c.* And upon Mr. Gapper's motion the indictment was quashed, because all indictments ought to be in *Latin*, and there is a proper *Latin* word for brown, *vis. fuscus* or *subniger*; and therefore the *Latin* word for brown being omitted, it vitiates the indictment. And although the indictment would have been good, as Mr. Reeve urged for the king, without inserting the colour of the yearlings; yet since it is put in, it cannot be rejected, and a taking only of brown yearlings could be given in evidence on this indictment.

Trinity Term

11 Georgii regis, B. R. 1725.

Eliz. Morfoot *vers.* Phil. Chivers, and Elizabeth
his wife.

THE plaintiff *Eliz. Morfoot* spinster, as executrix of *Eliz. Morfoot* widow, sued out a *scire fieri* inquiry against *Phil. Chivers* and *Elizabeth* his wife, administrators of *Henry Clark* deceased, upon a judgment for 2000*l.* recovered by the plaintiff as executrix of the said *Eliz. Morfoot* widow, against the defendants as administrators of the said *Henry Clark*. To which the sheriff returned, that the defendants had no goods in their hands, &c. of the said *Henry Clark*; then he returned an inquiry taken by him, which found, that divers goods and chattels, which were the said *Henry Clark's* at his death, to the value of the debt in the writ mentioned, came to the hands of the said *Philip* and *Elizabeth* his wife to be administred, *quae quidem bona et catalla postea* the said *Philip* and *Elizabeth* his wife *venderunt devastaverunt elongaverunt et in usum suum proprium converterunt*, &c. Upon which the defendants came in and demurred to the writ of *scire fieri* inquiry, and shewed specially for cause of demurrer, that it does not appear nor was expressly alleged in the writ, that the said *Elizabeth Morfoot* widow was dead, and because it did not appear, that the jurors in the said writ and inquisition named *fuere jurati et onerati ad inquirendum de praemissis*. As to the cause assigned in the demurrer, that it did not appear, that *Elizabeth Morfoot* the widow was dead, the court over-ruled it; because the *scire fieri* inquiry set out a judgment obtained by the plaintiff as executrix of *Elizabeth Morfoot* widow against the defendants, by which judgment the defendants were concluded to say, the plaintiff was not executrix of *Elizabeth Morfoot*, and by consequence are concluded to say, that she was not dead. Mr. *Martin* counsel for the defendant insisted, that it was necessary to allege, that the jury, which

The recovery of a judgment as executor precludes the person against whom such judgment is obtained from contesting the death of the supposed testator. S. C. Str. 631.

And in a *scire fieri* inquiry against him upon such judgment the plaintiff need not aver that such testator was dead. S. C. Str. 631.

If the inquisition upon a *scire fieri* inquiry imports to be taken by virtue of the writ to inquire of the matters therein contained by the oaths of A. B. &c. and states that the jurors being sworn and charged say upon their oaths that the defendant wasted, it need not allege in terms that the jurors were sworn and charged to inquire of the mat-

ters contained in the writ. An inquisition upon a *scire fieri* inquiry against baron and feme may state that they wasted and converted to their own use. S. C. Str. 631. R. sec. Str. 440. Vide Andr. 242. 1 Roll. Abr. 930. pl. 9.

found

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found the wasting, were sworn *de et super praemissis*; and compared it to the case in *Stiles* 164. *Crible v. Orchard*, where the jury after finding the issue for the plaintiff in an inferior court, assess damages *pro missis et custagiis*, &c. and do not say *circa festam expensis*; and *Rolle* chief justice held, this was ill, because it did not appear, by reason of the omission of those words, for what these *missa et custagia* were assessed. *Sed non allocatur per curiam*; for it being alleged in the inquisition, that the jurors *jurati et onerati existentes super sacramentum suum dicunt*, that the defendants had wasted, &c. they could not upon their oaths say the defendants had wasted, unless they had been sworn to inquire whether they had wasted or not, as the writ requires; and the inquisition is said to be taken *virtute praedicti brevis* to the inquisition annexed *ad inquirendum de et super materiis in eodem brevi contentis per sacramentum* of *Tho. Salmon*, &c. Then Mr. *Martin* for the defendants took another exception, that the said *Philip* and *Elizabeth* his wife *vendiderunt devotaverunt alongaverunt et in usum proprium converterunt*, &c. whereas the defendant *Elizabeth* neither could sell nor convert to her own use, being a *feme covert*. *Sed non allocatur*; for though a *feme covert* cannot convert to her own use, yet she may waste, which is a tort, and that a *feme covert* may be guilty of, *Cro. Car.* 518. 526. *Lord Monson v. Bourn*, 2 *Vent.* 45. Judgment was given for the plaintiff, June 9, 1725.

A *feme covert* may waste goods as executrix, though not convert them to her own use.

Morris vers. Lee.

S. C. Str. 629. 3 Mod. 362.

No particular words are necessary to make a bill of exchange or a promissory note. Vide *Bayley* 5, 6.

A note by which the maker promises to be accountable to *J. S.* or order for a sum of money value received is a proper negotiable note. Vide *Bayley* 6.

IN an action upon the case brought by the plaintiff as second indorsee of a note signed by the defendant, whereby the defendant promised to be accountable to *A.* or order for 100*l.* value received; the plaintiff declared upon the note; and also an *insimul computasset*; and on *non assumpsit* pleaded, verdict was given for the plaintiff, and entire damages. Mr. *Lee* last term, and Mr. *Foxakerley* this term, moved for the defendant in arrest of judgment, that this action could not be maintained by the plaintiff as indorsee of this note; because this was not negotiable nor assignable by the act 3 & 4 *Ann. c. 9.* for a note within that act must necessarily and originally import a promise to pay money; and therefore it was held *Mich. 1 Geo. B. R.* between *Smith* and *Babeme*, *post. vol. 3. p. 63. cit. ante* 1362. that a note signed by the defendant, whereby he promised to pay such a sum of money, or render the body of *J. S.* to prison, was not such a note as that an action could lie upon it by the statute, after failure of rendering the body to prison; because it was not necessarily and originally for payment of money, but by matter *ex post facto* became a note for payment of money.

money only, viz. the body not being surrendered to prison. So here, this note importing only a promise to be accountable for the money, the defendant is not obliged to pay the money to the person to whom it was first given, or to the indorsee; but may account for it another way, by having laid it out in goods for the party as a factor. If a man receives money for a special purpose, as to account, or to merchandize (which may be this case for any thing appearing to the contrary) it cannot be demanded as a duty, till he has neglected or refused to apply it according to the trust. 1 Salk. 9. *Boulter v. Cornwall*, though it was held there good after a verdict; because the court would intend, there was proof to the jury, that the defendant had done something to make himself an absolute debtor; and therefore an *indebitatus assumpsit* for money received *ad computandum* was held good after a verdict for the plaintiff. They insisted likewise, that it would be more for the benefit of trade, that the form of this sort of notes should be certain. But *per curiam*, there are no precise words necessary to be used in a promissory note or bill of exchange; *Rast.* 338. Deliver such a sum of money, makes a good bill of exchange. But if the promissory note is within the intent of the act it is sufficient, though it does not follow the very words of the act. Now by the receiving the value, the defendant became a debtor; and when he promises to be accountable for it to A. it is the same thing as a promise to pay to A. And it is the stronger, because it is to be accountable to A. or order, which is the proper expression used in such notes, and mentioned in the act of parliament, where it is intended the note should be indorstable or negotiable. But it would be an odd construction, to expound the word accountable, to give an account, when there may be several indorsees. But if this note had been value received upon account, it might have had a different consideration. *Sed quære.* *Powys* justice relied much upon the verdict in this case; but *Fortescue* justice, *Reynolds* justice, and *Raymond* chief justice, were of opinion, that if the note was not within the act, the verdict could not help it; but the note would be within the act, or not, upon the words of the note. Judgment for the plaintiff. Mr. Gapper counsel for the plaintiff.

Note, value received upon account.

Hes *vers.* Pitt.

ERROR upon a judgment given in the common pleas by default; and one of the errors assigned was the want of a writ of inquiry of damages; and upon a *certiorari* taken out by the plaintiff in error, to verify his error, it was certified, that there was no writ of inquiry. But *per curiam*, viz. *Raymond* chief justice, *Powys*, *Fortescue*, and *Reynolds* justices, the judgment was affirmed, because the want

No objection can be taken on account of the want of a judicial writ either after a verdict or a judgment by default. A writ of inquiry is a judicial writ.

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want of a judicial writ was helped by 18 *El. c. 14.* after a verdict; and by 4 *Ann. c. 16.* for the amendment of the law, &c. all the statutes of jeofails are extended to judgments given upon default. Mr. *Reeve* counsel for the defendant in error. And afterwards in *Michaelmas* term 4 G. 2. 1730. November the 10th, the very same point was adjudged, *Mallory v. Jennings*, intr. Trin. 3 & 4 G. 2. B. R. and Hil. 3 G. 2. C. B. Rot. 496. Str. 878. Fitzg. 162. 1 *Barnard. B. R. 376.* by *Raymond* chief justice, *Probyn* and *Lee* justices; and the judgment of the common pleas affirmed.

Intr. Pasch.
11 Geo. B. R.
Rot. 21.

An attorney can only sue by writ of privilege when he sues alone.

If he sues by writ of privilege where he ought not, any judgment he may obtain will be erroneous.

But it shall not be reversed unless the writ of privilege is brought before the court by certiorari; for the recital in the introductory part of the declaration that the defendant was attached "by writ of privilege" does not furnish sufficient proof that the suit was commenced by writ of privilege. Vide ante 902. and the books there cited.

Timothy Drew and Jane his wife *vers.* Jos. Rose.

ERROR upon judgment given for *Drew* and his wife against *Rose* in the common pleas by default. The entry on record was, *Middlsex ss. Josephus Rose attachatus fuit per breve domini regis nunc de privilegio e curia hac emanans ad respondendum Timotheo Drew generoso, uni clericorum Ricardi Foley armigeri prothonotarii curiae domini regis de banca, juxta libertates et privilegia ejusdem curiae hujusmodi clericis et aliis ministris de eodem banco a tempore quo non extat memoria usitata et approbata in eadem, et Janae uxori ejus, de placitis transgressionis super casum*; and then the plaintiffs declare on a promissory note for 76l. 10s. made by the defendant *Rose* to the plaintiff *Jane dum sola*, &c. and judgment was given by *Rose* in the king's bench on this judgment he assigned for error the want of a writ of privilege; and took out a certiorari to make good his error, but did not procure it to be returned. Mr. *Lee* for the plaintiff in error insisted, that the judgment ought to be reversed; because it appears, the suit was by writ of privilege; and although the plaintiff *Drew* as clerk to one of the prothonotaries of the common pleas might sue by such writ; yet if a privileged person joins in suit with another, or sues *en autre droit*, as here he does in right of his wife, he cannot sue by writ of privilege. And for this he cited *Dier 377. Noy 61. Eldrington* against *Ashton* and his wife. 2 *Roll. Abr. Privilege 274. G.* And the court were of opinion, that if this suit was by writ of privilege, it was ill; but they held, that it does not sufficiently appear to them, that it was by writ of privilege; for the recital in the declaration is not sufficient for them to found a judgment upon; but the writ of privilege ought to have been brought before the court by return to the certiorari. And therefore judgment was affirmed.

Will. Reynolds *vers.* Edw. Clarke.

S. C. 3 Mod. 272. Fort. 212.

Intr. Trin. 8
Geo. B. R. Rot.
474.

TRespafs. The plaintiff declared, that the defendant the first of *June 7 Geo.* and divers days and times between that day and the 20th of *October* then next, at *Abingdon* in the county of *Berks*, *vi et armis* the plaintiff's mansion house, in which he inhabited, and his backside to the said house belonging, did break and enter, and laid filth in the backside, and placed a spout, *quod ratione inde aqua per tempestates pluviales in compluvium praedictum a domo of the defendant descendens per compluvium illud atrio praedicto currebat et stabulum et pandoxatorium ipsius Willielmi in atrio praedicto superfluxit; ac ratione inde muri et fundamenta stabuli et pandoxatorii praedicti corrupta putrida et spoliata devenerunt, &c.* The defendant as to all the trespass but entering into the backside and setting up the spout, pleaded not guilty: and as to the entering into the backside and placing the spout, &c. he pleads, that long before the supposed trespass, viz. 25th of *August 1708*, one *John Fountaine* was seised in fee of the said mansion house and backside, and of two messuages adjoining to the backside, in which backside there then were and yet are a house of office, a well, and a pump to the said well belonging; that the said *John Fountaine* the said mansion house and backside with the appurtenances, excepting and reserving the free use of the backside and house of office, pump and well in the said backside to the said *John Fountaine*, his heirs and assigns, and all the tenants and occupiers of the said two messuages and each of them in common with the plaintiff and *John Tyler*, their heirs and assigns, occupiers of the said mansion house and backside, did by lease and release convey to the plaintiff and the said *John Tyler* and their heirs and assigns: that *John Fountaine* afterwards, viz. 24th of *February 1710*, being so seised, of the said messuages with the use of the backside, house of office, well, and pump aforesaid, *ut ad eadem duo messuagia virtute reservationis praedictae spectantibus et pertinentibus*, by his last will devised the said two messuages with the appurtenances to one *Daniel Yates* in fee, that *John Fountaine* died, and *Daniel Yates* entered; and then by several conveyances set out in the plea he brings down a title to him and his heirs to the two messuages with the appurtenances aforesaid, by virtue whereof the defendant the time when, &c. was seised in his demesne as of fee of the said two messuages with the appurtenances and had one of the said messuages with the appurtenances the time when, &c. in his actual possession and occupation, and that at the time of the making the lease and release from *Fountaine* to the

The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot put up spouts to collect that rain and discharge it upon such land in a body.

For an act immediately injurious, trespass is the proper remedy. S. C. Str. 634. R. acc. 2 T. R. 225. D. acc. 3 Will. 409. 412. Bl. 894. 899. agr. Burr. 1114. D. acc. agr. Burr. 1559. 2 Will. 313. vide ante 188, 272. Bl. 897.

For an act consequentially so, case, S. C. Str. 634. D. acc. 3 Will. 409. 412. Bl. 894. 899. acc. 2 L. R. 225. agr. Burr. 1114. D. acc. agr. Bar. 1559. 2 Will. 313. vide ante 188, 272. Bl. 897.

Fixing a spout so as to discharge water upon the land of another, is only consequentially injurious. S. C. Str. 634. vide ante 272. Poph. 46. If a man has a right to use a yard in common

with the owner, he will not be a trespasser by entering it to do an act which must be consequentially injurious to the owner of the yard. S. C. Str. 634.

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plaintiff and John Tyler, and before and always after, the rain water came down from the said one messuage into the said backside; and that the defendant being so seised of the said messuage with the appurtenances, the said defendant *tempore quo, &c. atrium prædictum intravit, et atrio prædicto utendo compluvium prædictum pro necessario usu ejusdem mesuagii in et super idem mesuagium in atrio prædicto posuit et locavit et ad mesuagium illud affixit, ad convolvendum aquas pluviales ab eodem mesuagio in atrium prædictum: prout ei bene licuit*; which entry of the backside, and placing of the spout aforesaid, are the same entry of the backside, and placing of the spout, whereof the plaintiff complains, &c. To which plea the plaintiff demurred, and the defendant joined in demurrer.

This cause was argued Trinity term 1724, by Mr. serjeant Hawkins for the plaintiff, and Mr. Reeve for the defendant; and this term by Mr. Fazakerley for the defendant, and by Mr. Lee for the plaintiff. And the counsel for the plaintiff insisted, that this was not a good justification; for where a man has a right for the rain water to fall from the eaves of his house into a yard or backside belonging to another person, yet he cannot justify putting up a spout, and collecting the water into a larger body, and then make it fall into the yard. Besides, here is no prescription laid for rain water to fall into the yard off of the defendant's house, nor any grant set out for that purpose. By unity of possession, prescriptions for interest and profits, as rents commons, &c. are (a) extinguished; but prescriptions, for easements, as for lights, air, gutters, dropping of eaves, &c. are (b) not extinguished by unity of possession; but after the unity of possession is determined, and the things severed, the easements will revive. *Hob. 131. Robins v. Barnes. 11 H. 7; 25. b. pl. 6. Br. Extinguishment 60.* But then when the houses come into several hands, the easement cannot be altered or enlarged, though it being of necessity may be enjoyed as before the unity of possession; and therefore the defendant could not set up a spout, if he had had a prescription for the easement before the unity of possession. As if a man has *eslovers* belonging to his house, and he builds new chimnies, he cannot use the *eslovers* in the new chimnies; 4 Co. 87. *Luttrell's case*; nor can intitle himself to more *eslovers* by the increase of his chimnies: *New Dier in margine 295.* In this case the coming down of the rain water has done the plaintiff great damage, for it is laid in the declaration, and not denied by the defendant, that the rain water coming through the spout overflowed the plaintiff's stable and brewhouse, *et ratione inde muri et fundamenta stabuli et pandoxatorii prædictorum corrupta putrida et spoliata devenerunt, &c.* The counsel for the defendant gave no answer to what was insisted on by

(a) D. acc. Dav.
5. a. b.

(b) Vide Poph.
166. 3 Bulstr.
339. W. Jon.
145. Latch. 154.
Noy. 84. Cro.
Jac. 170. 2 Sid.
39. 111. Ow.
221. 11 H. 4.
5. a. Bro. Extinguishment pl.
31 Fitz. Extinguishment, pl. 4.
Noy. 119. Poph.
170.

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by the counsel for the plaintiff by way of objection to the plea, but put the case upon another point; and therefore the point of the justification was not expressly determined. But *Fortescue* and *Raymond* justices upon the argument of Trinity term 1724 seemed to be of opinion, that if the plaintiff's action had been an action of the case, as for a nuisance, the defendant could not justify the alteration made by him in setting up a spout.

But the counsel for the defendant insisted, that this action of trespass *vi et armis* would not lie. But if the plaintiff was injured by the water that came out of the spout, he ought to have an action on the case, and not an action of trespass *vi et armis*. For by the exception in the conveyance of the house to the plaintiff the defendant has a right to enter into the yard, and therefore this is well justified; then the defendant fixing a spout to his own house, though the plaintiff receives never so much damage by the consequence of it, cannot be a trespass to the plaintiff: and therefore trespass *vi et armis* cannot lie for it. The exception in the deed is a licence to the defendant to enter; and that licence being by the act of the party, though he did an illegal act after injurious to the plaintiff, that will not make his entry unlawful, nor him a trespasser *ab initio*; the difference in such case being, where a person enters by licence of the party, and by licence of the law: 8 Co. 14. *Six carpenter's case*: then the fixing the spout to the defendant's own house cannot be a trespass done to the plaintiff, nor can the flowing of the water out of the spout be a trespass done by the defendant to the plaintiff; because the flowing of the water is not the defendant's immediate act; but indeed it was the consequence of the defendant's act, viz. fixing the spout; but the consequence of an act will not make the act itself a trespass, for which trespass *vi et armis* will lie; but an action upon the case may lie. As to the allegation in the declaration, that the rain water coming through the spout overflowed the plaintiff's stable and brew-house, *ac ratione inde* the walls and foundation were rotted and spoiled; they said if that could be considered as a distinct trespass, it was answered by the not guilty, that going to the whole declaration, except the entry into the backside and fixing the spout: but if it was only to be looked on as laid in aggravation of damages, as it certainly must, it is not traversable, and no particular answer ought to be given to it. 10 Co. 10. 1 Ventr. 54. 340. 2 Jones 110.

To this objection the counsel for the plaintiff argued, that though case, or *quod permittat*, would lie, yet trespass *vi et armis* might lie also. They said, the freehold inheritance and possession of the backside was in the plaintiff, and the defendant had only the use of it for particular purposes,

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as to make use of the pump or privy; and if he enters to commit a trespass, he will be a trespasser *ab initio* by his entry; as if he entered to pull down the pump or house of office, and did so; and by the same reason he should be a trespasser, if he makes an unreasonable use of his entry. to fix up a spout to bring down so much rain as overflowed the plaintiff's stable and brewhouse, and rotted the walls and foundation. As if *A.* lends *B.* sheep to compost his land, if *B.* kills them, an action of trespass will lie against him. And Mr. *Lee* said, that though the defendant's fixing a spout to his house was lawful, yet if he fixed it in such a manner, as that the rain water must fall into it off of the house, and so come into the plaintiff's yard, whereby he is prejudiced; it is the same thing as if the defendant poured it into the plaintiff's yard out of a pail, in which case no doubt trespass would lie. And he cited *Hard. 60. Preston v. Mercer*, as in point; where in trespass *vi et armis* the plaintiff declared, that the defendant's filth and stinking water, being in the yard of the defendant's house near adjoining to the plaintiff's messuage, did make to run, which water pierced the walls of the plaintiff's house, and sunk into his cellar, &c. after a motion in arrest of judgment after a verdict, that the action ought to have been case and not trespass, the plaintiff had judgment.

This Trinity term 1725 upon the second argument my brothers *Fortescue* and *Reynolds* (*Powys* being absent) and myself were unanimous of opinion, that the plaintiff could not maintain an action of trespass *vi et armis* for the damage he sustained by the rain water flowing out of this spout, but ought to have brought an action on the case. And that as to the entry into the backside, and fixing the spout that was sufficiently justified. The distinction in law is, where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, &c. and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, &c. In the first case trespass *vi et armis* will lie; in the last it will not, but the plaintiff's proper remedy is by an action on the case. As if *A.* in his own ground stops the current of a water course, to the benefit of which *B.* is intitled, and thereby hinders the water coming to *B.*'s ground; trespass will not lie, but case will; because the stopping by *A.* of this watercourse in his ground was no wrong to *B.* but the consequence of it, viz. hindring the water from coming to *B.* was. And I cited a cause adjudged *Mich. 8 Ann B. R.* between *Loveridge* and *Hoskins*, where in an action on the case the plaintiff declared, and set out a title to a farm and a river in *Dorsetshire*, and that the defendant in a close called *Davis's* close dug two trenches, whereby he diverted the water from the plaintiff's river, *per quod*, &c. and after a verdict for the plaintiff, the late

lord

lord chief justice *Pratt*, then counsel for the defendant, moved in arrest of judgment, that the plaintiff ought to have brought an action of trespass, and that this action of the case was not a proper action: but *Holt* chief justice held, that trespass would not lie, because it did not appear, that *Davis's* close, where the trenches were dug, was the plaintiff's land, and then the digging the trenches was not a trespass to the plaintiff; but the damage he sustained was by diverting the water, which was the consequence of digging the trenches; and therefore he said this was properly an action on the case; but he held, that if *A.* brought trespass against *B.* for entering his meadow, and mowing his grass there, and making it into hay, *per quod* he lost the whole profit of his meadow; then the action of trespass *vi et armis* would be the proper action, and case would not lie; for the *per quod* would only be in aggravation of damages: and in that case of *Lovridge* and *Hoskins* the plaintiff had judgment. And upon this distinction that point in *Hardr.* 61. may be law; because it is laid, the defendant made the water to run, which is the same as if it had been laid, the defendant poured the water; and therefore if it had been laid, the defendant poured the rain water into the plaintiff's yard, trespass would have lain, because the immediate act of pouring by the plaintiff would have been a trespass. If *J. S.* lays a log of wood in the highway, and *J. N.* receives hurt by it, trespass will not lie, because the injury is only a consequence of the act done; but case will lie. Judgment was given for the defendant.

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S. C. Str. 666. 3 Mod. 316.

Judgment was given in the common pleas against both the defendants, in an ejectment. *Miles* brought a writ of error alone upon this judgment; and the writ of error was quashed by the king's bench, because *Cowper* did not join in it. Afterwards they both brought a writ of error, *coram vobis residet*. And Mr. *Reeve* in *Michaelmas* term last moved for costs, upon quashing the writ of error, upon the act for the amendment of the law; and also that they might take out execution upon the judgment, notwithstanding the writ of error *coram vobis residet*. And as to the costs he insisted, that the defendant in error ought to have, not only the costs of the motion made about quashing the writ of error, but costs in the same manner as if the judgment had been affirmed. *Quod fuit concessum per curiam*. For so are the words of 4 *Ann. c. 16. s. 25*. And a rule for that purpose was made accordingly. Then as to the taking out execution, notwithstanding the writ of error *coram vobis*

Upon quashing a writ of error, the defendant shall have costs as he should have had the judgment been affirmed. R. acc. An. 135. Vide 4 An. c. 16. s. 25.

All the persons against whom a judgment is given ought if living to join in a writ of error upon it. S. C. 3 Mod. 305. R. acc. ante 71. 870. Carth. 7. Str. 233. post 1532. An. 135. 1 Will. 88.

Adm. Barr. 1792. D. acc. Yelv. 209. ante 328. Vide Com. Pleader 3 B. 9. 2d ed. vol. 5. p. 201. But a writ brought by some of them only will remove the record. R. acc. ante 151. D. acc. T. R. 738. Vide Yelv. 6. 212.

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residet, he argued last *Michaelmas* term, at which time this case was first moved, that the record was never removed by the first writ of error; for he argued, that if the record is removed by writ error, and afterwards is abated, as by death of one of the parties, or by plea, then error *coram vobis residet* lies; but not if the record is never removed; as in cases of variance between the record and the writ of error, the record is not removed, but the writs of error in these cases are quashed. In this case the matter appears upon the face of the record and writ of error, without plea or shewing any thing *dehors*, and it thereby appears, to have never been a good writ. Suppose judgment is given for *A.* against *B.* in the common pleas, and *C.* brings a writ of error, the record will not be removed thereby, because *C.* cannot maintain a writ of error upon a judgment given against *B.* and this case he said, was like that; for one defendant, when there are two defendants to the original action, can no more maintain error on that judgment, than a mere stranger. In 3 *Mod.* 134. *Hacket v. Herne*, though the book says the writ abated, yet it was quashed as in this case. He said this was only a contrivance to avoid putting in bail upon the writ of error, for the bail put in upon the first writ of error was gone, because the condition of the recognisance was to prosecute that writ of error; but that writ is now gone it being quashed, and they do not put in bail upon writs of error *coram vobis residet*; and therefore he concluded, no writ of error *coram vobis residet* would lie.

Serjeant *John Comyns* for the plaintiff in error insisted upon it, that the record was well removed, because there is no variance in the title or substance of the record and the writ of error; only it is laid in the writ of error to be *ad damnum* of one of the defendants, whereas it ought to be *ad damnum* of both, because they ought to join in it. When one defendant without the other brings a writ of error, the writ must abate. 3 *Mod.* 134. And where a writ of error abates, error *coram vobis*, &c. lies. 1 *Roll. Abr.* 733. 2. As to bail he said, it might be done in this case as in all other cases of writs of error *coram vobis*, &c.

Pratt chief justice seeming to incline, that the record was not removed, contrary to the opinion of the other judges, *adjournatur*. Afterwards my brothers *Fortescue* and *Reynolds* having considered this, it being stirred again, we were unanimous of opinion, that the record was removed into the king's bench by the first writ of error, and consequently that error *coram vobis residet* well lay, for the reasons given by my brother *Comyns*. And for an authority in point we relied on the case of *Walter v. Stoco*, *Hil.* 7 & 8 *Wil.* 3. *B. R.* 1695-6. ante 71. 151. where in judgment in trespass against five, four brought error, for which the writ was quashed; and afterwards they brought a writ of error *coram vobis residet*, which writ of error *coram vobis*, &c. was quashed. *Hil.* 8 & 9 *Will.* 3. *B. R.* 1696-7. And

we gave our opinions (*absente Powys justice*) that the writ of error *coram vobis*, &c. in this case was well brought. And we gave the plaintiff in error time to put in bail.

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The King *vers.* Harwood.

S. C. but with the opinion of the Court the other way. 3 Mod. 380.

TO a *mandamus* directed to the defendant Dr. Harwood, as commissary of the dean and chapter of *St. Paul's* commanding him to swear *William Folbigg* one of the churchwardens of the parish of *St. Giler Cripplegate, London*, being duly elected, &c. the defendant returned, *non fuit electus*. And it was insisted on behalf of *Folbigg*, that the return was ill; that the archdeacon, who was only to obey the writ, could not judge of the election, and therefore upon such a return to such a writ a peremptory *mandamus* was granted last *Michaelmas* term. [See before, 1379.] That the arch-deacon, &c. could not judge of the qualities of a person chosen by the parish, *Hil. 8 Will. 3. the King v. Rice. 5 Mod. 325.* But both my brother *Reynolds* and myself took the return to be good. But upon the opportunity of the counsel for *Folbigg*, and pressing the authority of that case of the *King v. White*, and no counsel for the defendant appearing, a rule was made for a peremptory *mandamus, nisi*, &c. At which afterwards my brother *Reynolds* and I were much dissatisfied; but the counsel for the defendant at another day coming to shew cause against the rule, we discharged the rule. And the court not being unanimous, it was ordered to come on again in the paper. But (a) I never heard it stirred again. But there can be no doubt, but such a return is good.

On a *mandamus* to the ecclesiastical officer to swear in a person elected churchwarden, the officer may return that the person he is directed to swear in was not elected. R. cont. ante 1379. See vide the cases there cited. see also ante 138.

(a) According to Str. 895. it was determined in this case that the return was good.

The King *against* Venables.

AN (a) order was made by two justices of the peace for the county of *Hertford*, 15 November 1723, reciting, that whereas it appeared upon oath, that the defendant kept a common alehouse in the borough of *Hertford*, and that he kept it as a disorderly house; whereupon the said justices, for the reason aforesaid, and by reason a greater number of alehouses was kept in the said borough than were necessary, by the said order discharged and put away the selling ale from the said house, and did suppress the said *Robert Venables* from keeping a common alehouse, &c. Afterwards the justices the third of June 1724 made another (b) order, reciting the former orders, and a warrant

If a justice is impowered to make an order for suppressing alehouses, and on disobedience to make an order for the commitment of the offender, the latter order is not a bare execution of the first.

The justice is punishable if he makes the latter order without

summoning the offender. S. C. Str. 630. 678. Fort. 325. 1 Sess. Caf. 267. But it is not necessary that he should set forth in the order that he did so. S. C. Str. 630. 3 Mod. 377. Fort. 325. Sett. and Rem. 122. pl. 163. 1 Sess. Caf. 267. R. acc. Fort. 325. Vide *Sawyer* 304. Dougl. 112, 335. 636.

(a) Under 5 and 6 Edw. 6. c. 25. l. 1.

(b) Under 5 and 6 Edw. 6. c. 25. l. 3. under

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under their hands and seals commanding the constable to give notice of that order, and that oath had been made before them, that the defendant was served with that order, and reciting, that it appeared to them by the oath of two persons named in that order, that since the defendant had notice of that order, he had continually to the date thereof used the said house as an alehouse, and used commonly the selling of ale and beer therein, contrary to the former orders; the said justices therefore, by virtue of the statute, &c. ordered that the defendant should be committed to gaol for three days, and until he should enter into a recognizance, not to sell ale, &c. The defendant having removed these orders by *certiorari* into this court, Mr. Reeve took exception to both the orders, that it did not appear by either of them, that the defendant was summoned, and had an opportunity of making his defence: whereas if he had been heard, possibly he might have satisfied the justices, that the complaint was groundless. That in all summary convictions, of which nature these orders were, a summons was necessary to be shewn. So is 1 *Salk.* 151. the *Queen v. Dier*, where it is held by the court, that upon the complaint, the justices ought to make a *memorandum* and issue a summons, and if the party will not appear, or cannot be found, they may proceed; but there the conviction was quashed, because in the summons set out, the time of the appearance therein directed was impossible.

On the other side it was insisted upon by Mr. serjeant Carter, Mr. Corbett, and Mr. Foxakerley, in support of these orders, that as to the first order no summons was necessary, because the justices were judges what number of alehouses were proper to be permitted, and they had declared there were too many in the borough. As to the second order they argued, that it was in nature of a commitment in execution, and therefore no summons was necessary; as in cases of convictions for deer-stealing, if the constable returns the party has no goods, &c. he is presently committed, without any previous summons. *Sed non allocatur*: for *per curiam*, the second order cannot be considered as a bare execution of the first; but the commitment is grounded upon a fact done since the making the first order, *viz.* the defendant's continuing publickly to sell ale, &c. Then the counsel for the orders insisted, that there is no case, wherein it has been held, that in orders made by justices of the peace, it was necessary to shew, the party was summoned. As in orders for keeping a bastard child, *Hil.* 1720. the king *v. Hawkins*; *Mich.* 1721. the king *v. Clegg*, 1722. the king *v. Harris*, and *Trin.* 1724. the king *v. Austin*, in an order to suppress an alehouse, that exception was taken; but the order was not quashed for that, but because there was no county mentioned, only in the margin; and the *Queen v. King*, *Hil.* 1711.

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The court were unanimously of opinion, that the party in these cases ought to be heard, and for that purpose ought to be summoned on fact; and if the justices proceeded against a person without summoning him, it would be a misdemeanor in them, for which an information would lie against them. But since in these sorts of orders for suppressing alehouses, keeping bastards, &c. summonses have not been set out, they would intend the justices having jurisdiction had proceeded regularly, and that there was a summons; it not appearing by the order, that there was none, or that there had been an ill summons; for where it appears there was an ill summons, that will be fatal, and leave no room to make it good by intendment: which answers the case, 1 Salk. 181. And Fortescue justice said, the case of the *Queen v. King* was the very case in point. And the orders were confirmed, June 10, 1725. But afterwards it being made to appear to the court by affidavits, that the justices had proceeded in making the last order, without summoning *Venables*; after having heard counsel for the justices, the court gave leave to file an information against them.

Earl of Hindford *vers.* Charteris.

THE regularity of entring judgment against the defendant being referred to the master, it appeared upon his report, that the declaration was left in the office, but no declaration was delivered to the defendant's attorney, though the plaintiff's attorney knew the defendant's attorney, and where to find him. And this the court held not to be a regular delivery of the declaration; for before the making the (a) rule in this court in the late king *William's* time, that the defendant's attorney should pay the plaintiff's attorney for the declaration, the practice never was to leave the declaration in the office, if the defendant's attorney could be found, but the declaration was to be delivered to him; and therefore since that rule, it is not regular to leave the declaration in the office, unless the defendant's attorney cannot be found, or refuses to pay for the declaration. The like case happened this term between *Peach* and *Hobbs*. And therefore the court, for settling the practice as to delivery of declarations, made this following rule which I pronounced in court, and which was drawn up as follows: *Regula generalis. Ordinatum est, quod ubi speciale vel commune ballium affiletur pro aliquo defendente, et notitia inde datur; attorney pro querente narrationem deliberet attorney pro tali defendente, qui solverit proinde. Sed attorney pro defendente, vel clerici sui in absentia ejus, recusaverint solvere proinde, vel si locus habitationis talis attorney pro defendente ignotus fuerit attorney pro querente, tum licebit attorney pro*

A declaration cannot be left in the office after bail filed, if the residence of the defendant's attorney is known unless he or his clerks refuse to pay for it. Vide Imp. B. R. 4th ed. p. 149. 1 Crompt. 92.

(a) Tr. 13 W. 3.

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querente

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querente relinquere narrationem in officio cum clerico narrationum, sed immediate dabit notitiam inde in scriptis defendenti vel ejus attorney, et talis narratio aestimata fuerit bene deliberata tantum a tempore talis notitiae.

Vaughan *vers.* Evans.

S. C. Str. 630. and more fully 8 Mod. 374.

The great sessions in *Wales* cannot sequester for non-appearance the lands of any man whom they cannot serve with process. They cannot serve process out of *Wales*.
Vide ante 698.
Hutt. 59.

EVANS brought a bill of foreclosure in the court of grand sessions for the county of *Montgomery* against *Vaughan* and others, to foreclose *Vaughan* of his equity of redemption, upon a mortgage of lands that lay in that county. And last term a motion was made for a prohibition, upon suggestion that *Vaughan* did not inhabit in that county, but lived in *England*, and that *Evans* had sued out process in order to get a sequestration of *Vaughan's* lands that lay in *Montgomeryshire*. And after having heard Mr. *Rescue*, serjeant *Probyn*, and Mr. *Cowper*, against the prohibition, the court made the rule for the prohibition absolute; because the suit is in nature of a suit in chancery, and the process is personal, to summon the party; which cannot be served in this case, Mr. *Vaughan* living in *England* out of the jurisdiction of the court of grand sessions: and if he could not be served with the process, he could not be guilty of a contempt in not appearing upon it; and then by consequence no sequestration ought to go against his lands, though they lay in that county. And this is the same case in effect, as that in *Tranter v. Duggen*, in lord chief justice *Holt's* time. And though it was objected, that the court of chancery of *England* had their process served beyond sea, and brought parties into contempt, and this of the grand sessions was an original jurisdiction; the court said, this was not to be compared to the chancery (if they did proceed so) because this jurisdiction, though it was an original one, yet it was a limited one, and confined to that county. The rule for the prohibition was made absolute, June the 9th, 1725.

Michaelmas Term

12 Georgii regis, B. R. 1725.

Sir William Lowther's case.

S. C. Str. 637. 1 Sess. Caf. 369. c. 293.

MR. *Fazakerley* moved for leave to file an information in nature of a *quo warranto* against Sir *William Lowther* to shew by what authority he had made and set up a warren. But it was denied by the court; because it was of a private nature, and therefore proper to be prosecuted only in (a) the name of the attorney general by information, if his majesty thought fit. And the like motion was denied in the case of the lord *Lisburn*, not long ago; *October 28, 1725.*

A private person shall not be permitted to file a *quo warranto* information in respect of any thing of a private nature. R. acc. Andr. 14. A warren is of a private nature. D. acc. Andr. 15.

(a) Vide Cro. Elis. 548.

Hughes *vers.* Alvarez.

S. C. Str. 639.

THE defendant put in a plea in abatement, after having had *oyer* of the original, that the original was not returned, and that the plaintiff had not found pledges. And upon motion this plea was set aside, because it was put in without an *affidavit* of the truth of it; for though Mr. *Lee* and Mr. *Hussey* said, this appeared by the writ upon the *oyer*; and in cases where a matter is pleaded in abatement, which appears upon the record (as variances) there needs no *affidavit* by the act for the amendment of the law 4 Ann. c. 16. s. 11.; yet the court held, that this did not appear upon the *oyer* of the writ, for nothing appears but the writ itself; but this is a fact, which ought to be verified by *affidavit*.

The King *vers.* Collinbourn.

S. C. Str. 663, more at large, but with some difference (a) Sess. Caf. 235.

The apprentice of a freeman of London may be discharged by the sessions under 5 El. c. 4. f. 35. if the freeman lives out of London, and the apprentice serves him out of London.

UPON a special order of sessions removed into the king's bench by *certiorari*, for discharging an apprentice, who appeared by the order to have been bound to a glazier a freeman of the city of London, before the chamberlain of London; Mr. Urlin moved to quash the order, insisting that the apprentice, being bound before the chamberlain of London, the justices of peace had no power to discharge him, but he ought to be discharged by the chamberlain; for in the act of 5 El. c. 4. f. 40. the liberties and privileges of the citizens of London as to having and retaining apprentices are expressly saved, and it is declared that statute shall not be prejudicial to them. *Sed non allocatur*; for *per curiam*, the apprentice being out of London, and serving his master out of the city, there can be no proceedings against him before the chamberlain; but the justices of the peace have a jurisdiction to discharge him, notwithstanding he was bound in London.

The sessions may discharge an apprentice under 5 El. c. 4. f. 35. whatever the trade to which he is bound may be. R. cont. Salk. 471. Semb. cont. Sett. and Rem. 20. pl. 29.

2. Exception was taken to the order, that the justices could not discharge the apprentice, because the trade to which he was bound, *viz.* a glazier, was not within the statute of 5 Eliz. *Sed non allocatur*; for though formerly it was held, the trade ought to be a trade within the statute, yet the later resolutions have been otherwise. And a case was cited, where it was held, the trade need not be a trade within the statute, 6 Geo. in the case of *Hone* an apprentice. *The King v. Taunton*.

(a) According to the report in 1 Sess. Caf. the apprentice was bound in Middlesex.

Parker *vers.* Thornton.

S. C. Str. 640.

A man challenged as a jurymen cannot be sworn as a talefman.

AFTER a verdict for the plaintiff, a new trial was granted, because one *Hooper*, who was challenged upon the principal panel, and the challenge allowed, was afterwards sworn upon the jury as a talefman by the name of *Hook*; although it was insisted upon by the counsel for the plaintiff, that the verdict was given to the satisfaction of my brother *Denton*, who tried the cause.

Wiatt *vers.* Effington.

S. C. Str. 637. Fort. 377.

A declaration in trespass for taking goods must specify what the goods taken were. R. acc. Burr. 2455. vide ante 1007.

IN trespass for breaking the plaintiff's house, and taking away *diversa bona et catalla* of the plaintiff *ibidem inventa*, verdict was given for the plaintiff, and intire damages assessed; and upon Mr. *Ward's* motion the judgment was arrested, for the uncertainty in the declaration, in not specifying

fyng what the goods were, so that this recovery could not be pleaded in bar of another action brought for the same goods. Serjeant Darnall and Mr. Ketelby for the plaintiff.

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Bais *vers.* Bradford.

IN ejectment the demise in the declaration against the casual ejector, and afterwards delivered to the tenant in possession, was laid of the second of *June* last, to commence from *Lady-day* before; and after the tenant in possession had entered into the common rule, in the declaration in the issue delivered to the defendant the demise was laid to be of the second of *August* last, the title of the lessor of the plaintiff being upon a breach of a condition for non-payment of rent due *Midsummer* last. And serjeant Baines moved for the defendant, that the issue might be made according to the declaration delivered to the tenant in possession, because the plaintiff ought not to recover upon a title accrued subsequent to the delivery of the first declaration. Mr. Fazakerley for the plaintiff insisted, that the first declaration was only in nature of a notice, and therefore the second declaration might vary from the first as to the demise. But *per totam curiam*, by the course of this court there can be no alteration in the declaration in the issue from the first declaration delivered, only in the defendant's name. And a rule was made, that the issue should be made according to the declaration delivered against the casual ejector.

See Str. 1212.
but see also
Str. 807, 1086.
Burr. 2447. BL.
940. Cowp. 341.

Powell *vers.* Hord.

S. C. with some difference (a) Str. 650.

IN case against the sheriff of *Oxfordshire*, for a false return of *non est inventus* to an *alias capias ad satisfaciendum* upon a judgment of the common pleas, recovered by the plaintiff against one *Edward Jones* for 21*l.* 10*s.* and upon error brought in the king's bench affirmed, upon which the whole sum amounted to 43*l.* upon not guilty pleaded, the cause was tried before me at *nisi prius* in *Middlesex* this term. And it appeared upon the evidence, that the sheriff's bailiffs upon the first *capias* had frequent opportunity of taking *Jones*; and that when that return was out, the under-sheriff desired Mr. Atwood the plaintiff's attorney to take out another *capias ad satisfaciendum*, and he promised to arrest *Jones*, but did not, though he had opportunities to arrest him upon that writ. And the defendant upon the trial attempted in mitigation of damages to prove, *Jones* might yet be taken, but failed in that

In an action against a sheriff for the misconduct of his officer, the sheriff cannot call the officer as a witness without giving him a release. *vide ante* 1007. Burr. 2727. Gilb. Evidence. 122.

In an action against the sheriff for falsely returning

non est inventus to a *capias ad satisfaciendum* the jury may give damages to the amount of the debt in respect of which the *capias* was sued out. *vide* BL. 1048.

(a) According to the report in Str. the process to which the return was made was *meine process* only.

proof,

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proof, it appearing Jones had absconded. Upon which by my direction the jury gave the whole 43^l. debt in damages. And the defendant moved for a new trial; first, because I refused to admit the sheriff's bailiff to be a witness upon the trial, to prove that he often endeavoured to have arrested Jones on this *capias ad satisfaciendum*, but could not. *Sed non allocatur*; for my brothers agreed with me, the bailiff was no legal witness, because he is interested in the cause, having given security for his due executing process, and by consequence could not be a witness in his own cause. Then it was insisted upon by the counsel for the defendant, that the damages were excessive, because the jury had given damages for the whole debt; whereas they said the jury ought to have given only the charges the plaintiff had been at in the suing the *capias ad satisfaciendum*, &c. in damages. *Sed non allocatur*; for upon the circumstances of the case the court thought it very proper, the whole debt should be given in damages. Note, upon giving the verdict, the plaintiff entered into a rule by consent, that the sheriff should have liberty to use his name, in order to recover the debt against Jones, the sheriff consenting to indemnify the plaintiff against all costs, &c.

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Hilary Term

12 Georgii regis, B. R. 1725.

Will. Dobbs *vers.* John Edmunds.

S. C. with a trifling difference, Str. 681.

IN trespass the plaintiff declared, *quod cum* the defendant such a day broke and entered his house, &c. *neqnon de eo quod* the defendant *possea*, such a day, *vi et armis* entered his shop, &c. Upon not guilty pleaded a verdict was found for the plaintiff, but damages were given severally, *viz.* 1*d.* on the first fact, and 40*s.* for the second fact. And now it was moved in arrest of judgment, that the taking the damages severally would not help the fault in the declaration; for the *quod cum* went through the whole declaration, and so no fact was positively alleged; which (a) is ill in trespass, and has been often so adjudged, 1 *Roll. Rep.* 55. But it was held *per curiam*, that the *neqnon* should not bring in the second fact into the *quod cum*, but should be took to be a positive averment, as if the *queritur* had been repeated again, *viz. neqnon queritur de eo quod, &c.* which had certainly been good. And therefore the plaintiff had his judgment for the damages found for the second fact. And the court declared, they would be bound by what had been already often determined; but they should be very cautious of extending this exception after a verdict further than it had been carried before.

(a) Vide 1 Willf.
99. 2 Willf. 203.
(b) Anon. B. R.
M. 19 G. 3.

(b) In the anonymous case in B. R. the court held that to declare with a *subteritas* in an action by bill was bad on a special demurrer, but would be unexceptionable after verdict.

Portman *vers.* Cane.

S. C. Str. 682.

AN executor brought debt upon a bond entered into by the defendant to the testator in 1676; and a breach was assigned to be made by the defendant in the executor's time about a year before the action brought. And on issue thereupon verdict was given for the defendant. And serjeant Chapple moved, the plaintiff might pay costs, because

A man who sues as executor and can only sue as such shall not pay costs on a verdict against him. vide ante 863. and the books there

cited. An executor can only sue as such upon a specialty to his testator, the

the breach was assigned to be done after the testator's death in the executor's time. *Sed non allocatur*; for *per curiam*, the bond is the cause of action, and the plaintiff could not sue but as executor. And therefore the motion was denied. 1 Ventr. 92.

Parker *vers.* Stanton.

S. C. Str. 679.

The plaintiff in error cannot plead to the *seire facias* quare executionem non that the execution is executed.

TO a *seire facias* sued by the defendant in error, *quare executionem non*, &c. in order to compel the plaintiff in error to assign his errors, the plaintiff in error pleaded, that the defendant in error had sued execution in the common pleas, and levied his debt recovered. And upon Mr. *Strange's* motion this plea was set aside as a sham plea, (as a plea of payment in the like case was set aside in *Hil. 10 Geo.*) for the meaning of suing out this writ, is only to compel the plaintiff in error to assign his errors; and if such pleading as this should be encouraged, it would occasion great delays and vexation in the recovery of debts.

Intr. Hil. 13
Geo. C. B. Rot.
339. and Hil.
13 Geo. B. R.
Rot.

Nothing can be assigned for error which is contrary to the record.

R. sec. 1 Will.
35. ante 384.
and see Com.
Pleaser. 3. B.
16. ad. Ed. vol.
5. p. 301.
3 Bac. 218.

Helbut *vers.* Held. Error C. B.

S. C. Str. 684.

HELD brought an action of assault and battery in the common pleas against *Helbut*, and upon his pleading the general issue verdict and judgment was given for *Held*. Upon which *Helbut* brought this writ of error in the king's bench, and assigned for error, *quod per recordum praedictum apparet, quod praedictus Edwardus Richier* [mentioned in the *posse* to be the only juryman who appeared on the principal panel] *jurator nominatus in panello praedicto de habendo corpora juratorum summonitorum inter praedictum Hugonem et Isaacum annexo exactus venit*, and was sworn on the jury, and gave his verdict *simul cum juratoribus praedictis de novo appositus*; whereas by the record of the *venire facias* it appeared, that the said *Edward Richier* was not returned, nor impannelled by the sheriff of London in the panel to the said writ of *venire facias* annexed, and returned, as by law he ought, &c. Then he alleges diminution of the *venire facias* and *habeas corpora*, and prays a *certiorari* to the *custos brevium* of the common pleas; but does not get the *certiorari* returned. The defendant in error pleaded, *in nullo est erratum*, &c.

Mr. *Parker* for the plaintiff in error argued, that this verdict, being given by a person not named in the panel upon the *venire*, is ill, and the judgment thereupon given is erroneous. And

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And for this he cited 5 Co. 42. b. the countess of Rutland's case, where it is held, that if a person is well returned in the panel of the *venire facias*, and is misnamed in the *distringas*, or *habeas corpora*; the process was discontinued, before 32 H. 8. c. 30. and 18 Eliz. c. 14. But now after verdict judgment shall not be staid, because all discontinuances after verdict are helped by those statutes; and therefore in that case the *venire facias* and *distringas* being right, and the mistake in the name being in the panel before the justice of *nisi prius*, and the *poslea*, it appearing upon examination of the sheriff, that the person who gave the verdict was rightly named in the *venire*, it was amended; the motion there being in arrest of judgment. But it is there held, that even then if a juror was misnamed in the *venire facias*, though he was rightly named in all the subsequent process, it was not amendable. Now here the person who gave the verdict is not named in the panel of the *venire*, and therefore it must be error: and the statute of 21 Jac. 1. c. 13. does not help this case, for that statute only helped where any of the jurors, who tried the cause, is misnamed in any of the said writs; but here he is not named at all.

But it was insisted upon by Mr. *Strange*, for the defendant in error, and so adjudged by the court, that this was not assignable for error, it being against the record, the *venire facias* and *habeas corpora* not being returned upon the *certiorari* to the *custos breviarum*. And judgment was affirmed February 9, 1725.

Micb. 3 Geo. 2. B. R. Plummer v. Webb and Cripp. Debt on a bond; *non est factum* pleaded, verdict and judgment for the plaintiff in the common pleas; on error on this judgment, error was assigned, that *Webb* died before the day of *nisi prius*; and held it was not assignable for error, because the record mentioned that he appeared that day. Judgment was affirmed November 7, 1729.

The King *vers.* John Hill.

THE defendant was convicted by Sir Henry Bateman, a justice of the peace of *Middlesex*, for unlawfully keeping a lurcher and a gun to kill and destroy the game, *non existens qualificatus per leges hujus regni ad hoc faciendum, contra formam statuti in hujusmodi casu editi et provis.* And this conviction being removed into the king's bench by *certiorari*, was quashed Saturday, February 12, 1725. because it was only averred generally, that he was not qualified, and did not aver that the defendant had not the particular qualifications mentioned in the statute as to degree, estate, &c.

A conviction upon the game acts must shew specifically that the defendant had not any of the qualifications mentioned in 22 & 23 Car. 2. c. 25. R. sec. Burr. 148. vide Dougl. 331. Str. 66. 1 T. R. 127.

White *vers.* Clever.

S. C. Str. 681.

In an action on a bond of indemnity, a plea that he did indemnify, tho' it does not state how, is unexceptionable upon a general demurrer.

DEBT on a bond for 400*l*. The defendant prayed *oyer* of the bond, and of the condition, which was, that the defendant should do several particular things, and also indemnify and save harmless the plaintiff, from, &c. As to the things to be done, the defendant pleaded he did them; and as to the indemnifying the plaintiff, and saving the plaintiff harmless from, &c. the defendant pleaded, *quod indemnificavit ac indemnem servavit* the plaintiff *ab*, &c. To which plea the plaintiff demurred generally, and the defendant joined in demurrer. And serjeant *Whitaker* for the plaintiff took exception to the plea, that it was ill, because the defendant did not shew, how he indemnified the plaintiff. *Cro. Jac.* 165. *Allington v. Yearkner*. *Hob.* 296. And it is ill on a general demurrer. *Cro. Jac.* 165, 363, 340, 503, 634. But if the defendant had pleaded in the negative, that the plaintiff *non fuit damnificatus*, it had been good. *Cro. Jac.* 634. 2 *Co.* 4. 1 *Lrv.* 194. But Mr. *Lee* for the defendant insisted, that it was but form, and was good upon a general demurrer. So it is held 1 *Lrv.* 194. *Cutler* against *Southern*, and 1 *Lutw.* 428. *Lovelace v. Bickham*. And all the court were unanimous of opinion, that such pleading is well upon a general demurrer since the act for the amendment of the law, 4 *Ann.* c. 16. And therefore, because the defendant had not demurred specially, and shewed it for cause, judgment was given for the defendant, *Pasch.* 12 *Geo.* B. R. *Apr.* 29, 1726. Note, this action was brought upon the same bond as the plaintiff afterwards brought another action upon, and obtained judgment. *Mich.* 13 *Geo.* B. R. 1726. *post.* 1499.

Easter Term

12 Georgii regis, B. R. 1726.

Ludwell *vers.* Hole.

S. C. Str. 696.

CASE for these words spoke by the defendant of the plaintiff, viz. "You are a cheating old rogue, and have cheated the fatherless and widow." After verdict for the plaintiff, serjeant *Belfield* moved in arrest of judgment, that these words are not actionable, there being no colloquium laid of the plaintiff's trade; and cited 5 *Mod.* 398. *Savage v. Roberts.* 1 *Ro. Ab.* 62. *pl.* 25. *Hard.* 8. *Wake v. Chapman:* and that difference was took, *Raym.* 62. *Davis v. Jones.* On the other side Mr. *Gapper* argued for the plaintiff, that the words should not be took in *mitiori sensu* now, and quoted *Cro. Jac.* 673. and *Raym.* 86. *Terry v. Hooper.* But the court held, the words would not be actionable, unless spoke of the plaintiff in his trade, for which the cases cited by serjeant *Belfield* are in point. And therefore judgment was arrested, May 17, 1726.

'Tis not actionable to charge a man with cheating, unless he is a trader, and the words were spoken of him in his trade. R. acc. Str. 1169. vide Burr. 1688.

Eden *vers.* Wills.

S. C. Str. 694.

MR. *Parker* moved to quash a *scire facias quare executionem non*, &c. sued by the defendant in error, to make the plaintiff assign his errors; because the original suit in the common pleas was by bill of privilege, and the *scire facias* therefore ought to be returnable at a day certain, but this was made returnable upon a common return. And of that opinion was the court, because *scire facias*'s ought to be made returnable according to the nature of the original suit below in the common pleas. And *Trin.* 11 *Ann.* between *Vavasor* and *Parker*, it was adjudged so by the court of king's bench in the very same case. And the writ was quashed. Mr. *Aclerly* for the defendant in error.

A *scire facias* upon a judgment must be made returnable as the process in the action in which the judgment was recovered was. R. cont. ante 353.

Trinity Term

12 Georgii regis, B. R. 1726.

Goodright *vers.* Shuffill.

R. cont. 3 Will.
51. Semb. cont.
Burr. 1046. fed
vide Gilb. C. B.
187.

IN ejectment, plea of ancient demesne was allowed to be well, without an *affidavit* to verify the fact. And such plea had been before allowed to be good in earl *Cuningesby's* case.

Godfrey *vers.* Philpot.

Acc. 1 Will.
222.

MR. *Faxakerley* moved to change the *venue* into *Chester*; and it was granted *per curiam*, because this court can send down the record by *mittimus*.

Martha Frontin *vers.* Small. Covenant.

Intr. Hil. 12
Geo. B. R. Rot.

S. C. Str. 705.

A person empowered by warrant of attorney to execute a deed for another must execute it in the name of the principal. R. acc. Moor. 818. D. acc. 9 Co. 77. a. Also importing to be made by the lessor as attorney for another is void upon the face of it. R. acc. Moor. 818.

At least the attorney cannot maintain an action upon it in his own name.

THE plaintiff declared, *quod cum* by a writing of agreement *factum* 17 Dec. 1723. between herself attorney of *James Frontin* of the one part, and the defendant of the other part, which she produces in court under the seal of the defendant, she for and in the name, and as attorney of the said *James*, demised to the defendant a house in *Villers-street* in *York-buildings* for seven years from the twenty-fifth of *December* next, and that the defendant for himself, his heirs, executors and administrators, covenanted and agreed, that he, &c. would pay for the said messuage to the said *James Frontin* 60*l.* *per annum*, at four quarterly payments, &c. by virtue of which writing of agreement the defendant entred, and was and yet is possessed; and assigns for breach, that the defendant did not pay the said rent, but 45*l.* due to the said *Frontin* for three quarters of a year was and yet is due and unpaid, &c. The defend-

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ant demurred generally, and the plaintiff joined in demurrer. And Mr. *Strange* for the defendant insisted, that the plaintiff could not maintain this action, for the lease was void, because the plaintiff acting only as attorney to *James Frontin*, it should have been made as a lease from him and in his name. *Moor* 70. pl. 191. 9 Co. Rep. 77. *Combe's* case. If an attorney has a power by writing to make leases by indenture for years, &c. he cannot make an indenture in his own name, but in the name of him who gives him his warrant. And of this opinion was the whole court, and that therefore it appeared upon the face of the declaration, that the lease was void. And then Mr. *Strange* insisted, that if the lease was void, the (a) covenant in it to pay the rent was void also. But Mr. *Reeve* for the plaintiff argued, that though the lease was void, yet covenant might be maintained on the agreement. *James Frontin* could not maintain an action of covenant, because he was no party to the deed. 2 Inst. 673. *Scudamore v. Vandenstene*. But he said covenant would lie on the word *demisit*, which implies a covenant. But if there be an express covenant particular, viz. that he should quietly enjoy against all claiming under him, that restrains the general implied covenant. 1 Mod. 113. 1 Freem. 368. 3 Keb. 304. *Deering v. Farrington*. *Hale* held, that where a man *assignavit et transposuit* all the money that should be allowed him by any order of a foreign state, to come to him in lieu of his share of a ship; this was void as an assignment, but was a covenant, and was all one as if the defendant had covenanted, the plaintiff should have all the money the defendant should recover for loss of such a ship. Besides, the agreement being under seal, the defendant was estopped to say, the plaintiff did not demise, and it was very hard the defendant should enjoy the house as he did, and not be forced to pay the rent. But the court held, that it appearing on the declaration, that the lease was void, because it was not made in the name of *James Frontin*, whose house it appeared to be, and that the plaintiff only made it as his attorney, there could be no estoppel; and then the covenant to pay the rent was void, and the plaintiff could not maintain the action. And judgment was given for the defendant, *June 21, 1726*.

(a) Vide ante
388, and the
cases there cited.

Michaelmas Term

13 Georgii Regis, B. R. 1726.

Memorandum, that Robert Dormer esquire, one of the justices of the court of common pleas, died September 18 last, anno ætatis 77. And Sir Jeffery Gilbert knight, lord chief baron of the court of exchequer, died October 14 last, anno ætatis 52. And just before the beginning of this term Sir Thomas Pengelly knight, his majesty's premier serjeant at law, was sworn lord chief baron of the exchequer, and Mr. baron Price was sworn one of the justices of the common pleas. And on Wednesday October 26th Sir Littleton Powys knight, one of the justices of the court of king's bench, and the honourable Robert Tracy esquire, one of the justices of the common pleas, resigned both their offices by reason of their ill states of health. And his majesty as a reward for their past services, granted each of them a pension of 1500l. per annum. And Friday November the 4th Sir Francis Page knight, one of the barons of the exchequer, was sworn a judge of the common pleas in the room of Mr. justice Tracy; and Monday September the 7th Sir Lawrence Carter knight, one of his majesty's serjeants at law, and solicitor general to his royal highness the prince of Wales, was sworn a baron of the exchequer in the room of Mr. baron Price. And Mr. serjeant Probyn was sworn one of the justices of the king's bench in the room of Mr. justice Powys. And Mr. serjeant Comyns was sworn a baron of the exchequer in the room of Mr. baron Page.

John Astell *vers.* John Andrews.Intr. Trin.
11 Geo. B. R.
Rot. 408.

S. C. Str. 718.

THE plaintiff brought an action of debt, *qui tam, &c.* against the defendant, for 100*l.* &c. for selling French, Portugal, and Spanish wines, twenty several times by retale, *viz.* by the pint, the quart, and the gallon, to persons whose names are unknown to the plaintiff, between the 1st of March 10 G. and the 1st of March 11 G. at Bristol, to be drank at Bristol, the defendant not being authorised or enabled in manner and form as by the statute in that case made and provided is prescribed and appointed: *contra formam et effectum statuti praedicti; per quod* the defendant forfeited to the king and the plaintiff, *qui tam, &c.* 100*l.* *viz.* 5*l.* for every one of the said offences. Upon *nil debet* pleaded, and issue joined thereon, the cause was tried before my brother Denton at Bristol; and as to 95*l.* part of the 100*l.* the jury found for the defendant; but as to 5*l.* the remaining part of the 100*l.* the jury found a special verdict, *viz.* that the defendant the 11th of November in the eleventh year of this king, and for nine years then last past, was, and yet is, a merchant importer of French, Portugal, and Spanish wines, and for all that time dwelt and yet dwells in the city of Bristol in the county of the city of Bristol; that the defendant the 11th of November in the eleventh of the king, in his mansion house situate in Bristol, sold by the gallon to one Thomas Mills one gallon of red Port, to be drank at Bristol, and that the said Thomas Mills carried the said gallon of the said wine from the defendant's house to a common inn called the Guilders Inn in Bristol, and that there the said gallon of wine was drank; that the said Guilders Inn at the time of the sale of the said gallon of wine, and of the drinking thereof, was in the occupation of one Charles Selman, and not in the tenure or occupation of the defendant; that the defendant at the time of the sale of the said wine was not enabled to sell wine by retale by force of the statute of the 12th of Charles the second, c. 25. intituled an act for the better ordering the selling of wines by retale, and for preventing abuses in the mingling, corrupting, and vitiating of wines, and for settling and limiting the prices of the same; that the defendant never sold in any vessel whatsoever any wine to be drank within his mansion house, or within any place whatsoever in his tenure or occupation: but whether the defendant owes the 5*l.* &c. This case was argued twice at the bar, first by Mr. serjeant Chapple for the plaintiff, and Mr. Gapper for the defendant; and afterwards by Mr. serjeant Pengelly for the plaintiff, and Mr. Fazakerley for the defend-

If a statute imposes a penalty on the sale of any commodity by retale, without a licence, and provides that a licence shall be granted to such persons only as personally use the trade of selling by retale, an unlicensed person who in one single instance only sells the commodity by retale is liable to the penalty.

If a statute imposes a penalty on any person who shall sell a particular commodity to be used within his house or any place in his occupation, or without such house or place, a person who sells it is liable to the penalty wherever the commodity is to be used.

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defendant. And *Friday* the 4th of *November* the chief justice delivered the opinion of justice *Fortescue*, justice *Reynolds* and himself, that the plaintiff ought to have judgment, Mr. justice *Powys* having surrendered his office a little before.

The reason upon which the judges founded their resolution was, that by the facts found in the special verdict the defendant appears to be guilty of an offence within the express words of the statute of 12 *Car.* 2. c. 25. for by that act it is enacted, *f. 1.* that no person after the 25th of *March* 1661, unless authorised as by that act is prescribed, shall sell or utter by retale, *i. e.* by pint, quart, pottle, or gallon, or by any other greater or lesser retale measure, any kind of wine, to be drank or spent within his or their mansion house or houses, or other place in his or their tenure or occupation, or without such mansion house or houses, or such other place in his or their tenure or occupation, by any colour, craft, or mean whatsoever, upon pain to forfeit for every such offence 5*l.* &c. The jury here have found, that the defendant sold a gallon of wine, that is a selling by retale within the very words of the act, which explains what selling by retale is, and mentions sale by the gallon, as one of the instances. 2. They find, the wine was sold to be drank at *Bristol*, and that it was drank at the *Guilders Inn* in *Bristol*; that is a sale of wine to be drank out of the defendant's house, the words of the act being, to be drank within his mansion house or place in his occupation, or without such mansion house, &c. and then they find the defendant had no licence to sell, &c.

But it was objected by the counsel for the defendant, that it is found by the special verdict, that the defendant never sold any wine to be drank within his mansion house, or within any place whatsoever in his tenure or occupation; and they insisted the intent of the act was only to restrain sales of wine to be drank in their mansion houses or places in their tenure or occupation; and though there is afterwards the words, or without, &c. yet that must mean some yard, &c. belonging to such mansion house, &c. for otherwise the expression in the act is unaccountable. If it was intended to prohibit sales of wine to be drank in any place, it was idle to mention mansion houses and places in their tenure or occupation. Besides, the defendant is found to be a merchant importer of wine, and therefore more reasonable he should sell by retale in his house, the act being principally levelled at persons that keep taverns, &c. But the answer to this is, that the words of the act expressly extend to this case, and though perhaps the parliament might have used other expressions to have made the act as extensive without mentioning mansion houses, &c. yet their throw-

ing in those words do not restrain the other extensive words. And this act is recited by the act of 15 Car. 2. c. 14. to have this extensive construction, both in respect of the person selling, and of the place where the wine was sold to be drank. For by that act of 15 Car. 2. c. 14. it is recited to be enacted by this act of 12 Car. 2. c. 25. s. 1. that no person or persons whatsoever after the 25th of March 1661, unless authorised as by the said act is appointed, should sell wine by retale, to be spent in their mansion houses, or other place, under the penalty of 5 l. &c.

Another objection was made, that the verdict has found but one single fact, and that the parliament only intended to prohibit the using the trade of selling wines by retale, which must require several facts; and that appears by the clause which directs the granting licences to be to those who use the trade of selling wines by retale, s. 4. But to this it was answered, that the clause which prohibits the selling, is general, and lays a penalty upon every particular offence of 5 l. and it is upon that clause this question depends; and therefore in expounding acts of parliament where words are express, and plain, and clear, the words ought to be understood according to their genuine and natural signification and import, unless by putting such exposition a contradiction or inconsistency would arise in the act by reason of some subsequent clause, from whence it might be inferred, the intent of the parliament was otherwise. But that is not this case, for no inconsistency or contradiction will arise from the clause about granting licences, if the words of this clause are construed according to their true signification; but both clauses are very consistent, and the act will be no more than this, that no person shall sell by retale but such as have a licence; and that licences shall be granted only to those that use the trade of selling by retale. Judgment was given for the plaintiff.

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The King *vers.* Tenant.

S. C. Str. 716. 1 Sess. Caf. 272. pl. 211.

Several orders of bastardy being removed into this court by *certiorari*, the first order was made by two justices of the peace for the *West-riding of Yorkshire* upon the defendants, to keep a bastard child, as being the reputed father. From this order the defendant appealed to the quarter-sessions; and the justices at the quarter-sessions upon full hearing of the merits, discharged the order of the two justices; but bound the defendant by recognisance to appear at next quarter-sessions, as it was supposed, under an apprehension, that better evidence might be procured against him. After this the same two justices made a new order

After an order of bastardy by two justices has been discharged upon the merits, they cannot make a fresh order upon the person on whom the former was made.

Vide 1 Vent. 59.
Cro. Car. 342,
350, 471.
a Buller. 355.

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upon the defendant for keeping this bastard child. And all these orders being removed into this court November 10, 1726. the court quashed the last order of the two justices. For they having made an order upon the defendant, to keep the child as reputed father, and that order being regularly discharged upon an appeal, upon hearing the merits, the defendant was legally acquitted, and cannot be drawn in question again for the same fact. Mr. *Reres* counsel for the king, Mr. *Lee* counsel for the defendant.

Intr. Mich. 12
Geo. B. R.
Rol. 352.

David Griffin *vers.* Daniel Scott, Humfrey Bodman, John Mauldin, Abraham Pursehouse, Joaken Falack, and George Shenton.

S. C. but very shortly and incorrectly reported Str. 717. 1 Barnard. B. R. 3

Unless in cases in which a distrainer is authorized by statute to keep the distress on the premises upon which he distrained, he is liable to an action of trespass if he suffers them to remain there an unreasonable time.

Vide 11 G. 2.
c. 19. s. 30.
1 H. Bl. 13.

Eight days is an unreasonable time vide 1. H. Bl. 13.

IN an action of trespass brought by the plaintiff against the defendants, for breaking and entering the plaintiff's house at *Bermondsey* in *Surrey* the 18th of *June*, the eleventh of the king; and for continuing in possession of the house for eight days next following and for taking and carrying away from thence several goods of the plaintiff's, viz. grates, tongs, tables, a clock, &c. the defendants as to all, *propter fractionem et intrationem domus praedictae et continuationem in possessione ejusdem domus per spatium octo dierum*, and taking and carrying away the goods of the plaintiff, plead not guilty, and on that issue is joined; and as to all the rest of the trespass aforesaid, the defendants justify, and say, that Sir *William Bower*, and *Ebenezer Sadler* the 20th of *April* 1708, were seised in fee of a messuage and a piece of ground, &c. in the said parish of *Bermondsey*, and being thereof seised demised the same, the said 20th of *April* 1708, to *Anthony Tolat* from 25th of *March* then last past for sixty years, who entered and was possessed, &c. and 11th *June* 1708, built a house on part of the demised premises; that *Anthony Tolat* died intestate 1 *August* 1714; that administration was granted by the archbishop of *Canterbury* 5 *February* 1714 to *Ann Tolat*; that she entered on the demised premises, and the new erected house, and 15 *March* 1714 she assigned the residue of the sixty years term to *John Chamberlain*; that 11 *June* 1720 *John Chamberlain* died possessed thereof, &c. intestate; that administration to him was granted by the archbishop of *Canterbury* 5 *July* 1720, to *Robert Chamberlain*; that *Robert Chamberlain* entered, &c. and 6 *October* 1720 demised part of the premises comprised in the 60 years lease, of which the house in the declaration was part, to *William Rouse* for seven years from 29 *Septem.* 1720, reserving seventeen pounds *per annum* rent, payable the four usual quarterly payments, &c. that *William Rouse* entered and

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was and still is possessed, &c. that Robert Chamberlain 12 September 1722, bargained and sold and assigned the reversion of the premises demised, &c. for the remainder of the sixty years term to the defendant Daniel Scott, by virtue of which assignment the defendant Daniel Scott, according to the form of the statute in that case made and provided, of the said reversion of the premises before mentioned to be demised to the said William Rouse, whereof the house in the declaration is parcel, and of all other the premises demised to him assigned as aforesaid, was possessed; and the said Daniel Scott being so possessed thereof, 8 l. 10 s. of the said annual rent of 17 l. for the said premises last mentioned, *unde prædicta domus in narratione prædicta mentionata est parcella*, for two quarters of a year ending at Lady-day 1725 to the said Daniel Scott solubiles ad idem festum prædicto tempore quo, &c. in arcto et insoluto fuerunt, per quod the said Daniel Scott for non-payment of the said rent as aforesaid due, in jure suo proprio, and the other defendants in jure ipsius Danielis et per ejus præceptum, prædicto tempore quo, &c. in domum prædictam in narratione prædicta mentionatum, ut in parcel of the premises aforesaid abovementioned to be demised to the said William Rouse, intraverunt, and finding the said goods and chattels in the said house, the said defendants bona et catalla prædicta nomine districtionis for the rent as aforesaid being in arrear prædicto tempore quo, &c. ceperunt, ac pro meliori conservatione eorundem bonorum et catallorum in eadem domo existentium, bona et catalla illa in parte ejusdem domus, ubi melius fieri potuit per spatium octo dierum extunc proxime sequentium continuaverunt, et possessionem ejusdem domus pro proposito prædicto necessaria habuerunt, et denique eadem bona et catalla sic districta asportaverunt ad imparcandum, et eadem adtunc et ibidem in the said parish of Bermondsey imparcaverunt, ut districtionem pro reddito prædicto in arcto existente, prout eis bene licuit; quæ quidem intratio domus prædictæ, ac captio bonorum et catallorum prædictorum, et eorum continuatio in eadem domo, et possessio domus illius, ac denique asportatio bonorum et catallorum illorum, est totum prædictum residuum transgressionis prædictæ, whereof the plaintiff complains, &c.

To this plea the plaintiff replied, and after confessing, that Robert Chamberlain was possessed of the residue of the sixty years term, and made the lease to Rouse for seven years, as in the plea; he says, that Rouse 9 March 1720 assigned his lease to the plaintiff David Griffin, and that Robert Chamberlain assigned the reversion, &c. to the defendant Daniel Scott for the residue of the sixty years term, and that the plaintiff David upon Lady-day 1725, at the door of the house of the assigned premises, out of which the rent aforesaid was issuing, paratus fuit et obtulit ad solvendum præfate Danieli the said rent of 8 l. 10 s. ad idem festum solubilem, and that the said Daniel, nor any other person

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son of his part, was ready there to receive the said 8*l.* 10*s.* and that he the said *David* afterwards, and before the breaking and entry of the house aforesaid, &c. viz. 18 *June* the eleventh of this king at the parish of *Bermondsey* aforesaid, *potatus fuit et obtulit ad solvendum eidem Danieli* the said 8*l.* 10*s.* *sed illos prædictus Daniel adtunc et ibidem totaliter recipere recusavit, &c.* To this replication the defendants demurred, and shewed for cause, that it is not alleged in the replication, that the said *David* was always ready, and yet is ready, to pay to the said *Daniel* the said 8*l.* 10*s.* nor is it alleged, that the said *David* brought the money into court, to be paid to the said *Daniel*; and that it is not alleged, that the plaintiff at the time of the supposed trespass tendered the said 8*l.* 10*s.* The plaintiff joined in demurrer.

(a) Vide ante
639.

This cause was argued 25 *June* in last *Trinity* term, and again 11 *November* in this term. And the defendant's counsel took exceptions to the replication, that (a) it was ill for the causes specially assigned in the demurrer. But the court gave no opinion thereon, being clear of opinion, that the plea was ill. The defendant has justified the entry into the house, out of which the rent issued, and distraining the goods in the declaration for the rent; so far is right; and the continuing in possession of the house and goods for eight days. Now although the party might enter and distrain the goods, yet in a reasonable time he ought to remove them, and put them either into a pound overt, or close; but at common law no distress could be impounded on the premises; and for that reason sheaves or shocks of corn were not distrainable for rent, because nothing could be distrained, but what might be returned in as good a condition, as it was in when the distress was taken, but after a removal sheaves of corn could not be restored in the same condition, *Co. Lit.* 47. a. and therefore the statute 2 *W. & M. sess.* 1. c. 5. gives the lessor a power to distrain sheaves of corn, &c. and to lock up and detain the same upon the place where it is found; but that is only in the particular cases mentioned in that act. Then in this case, the defendant not having removed the corn in reasonable time, it has made his distress illegal; much less could he justify the detaining the possession of the house eight days upon account of the distress. And the adding in the plea, that *pro meliori conservatione eorundem bonorum ac catallarum in eadem domo existentium, bona et catella illa in parte ejusdem domus, ubi melius fieri potuit, for eight days then next following, continuaverunt, et possessionem ejusdem domus pro proposito prædicto necessario habuerunt, &c.* will not at all mend the case; since the law does not allow impounding a distress on the premises, unless in the cases within the statute 2 *W. & M.* which this is not. And *Forsc.* justice cited a case between *Cartwright* and *Comber* at *nisi prius*, tried before the earl of *Macchisfield*, when he was chief justice of the king's bench, where he ruled, that

that if a landlord distrains for rent, and keeps the goods on the premises longer than a reasonable time which the law allows him to remove them in, he is a trespasser *ab initio*. Six carpenters case, 8 Co. 146. The plea therefore being ill, the court in November 1726 gave judgment for the plaintiff. Serjeant Richard Comyns for the defendant, Mr. Gapper for the plaintiff.

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With some small but inconsiderable difference. Str. 719.

IN an action upon the case upon several promises, the plaintiff declared upon a promissory note dated 25 March 1720. signed and subscribed by the defendant, whereby he promised to pay the plaintiff or his order 12l. 11s. for value received, &c. there was also another count on an *indebitatus assumpsit* for 20l. lent by the plaintiff to the defendant: and the third count was on an *indebitatus assumpsit* for 20l. laid out by the plaintiff to the defendant's use, &c. damage 20l. The defendant *quod primam promissionem et assumptionem in narratione praedicta mentionatam*, pleads in bar, *quod ad aliquod tempus infra sex annos ante diem exhibitionis billae ipsius the plaintiff causa actionis quod dictam primam promissionem et assumptionem in narratione praedicta mentionatam non accrevit eidem Josepho versus ipsum Danielem*, &c. and as to the second and third promises in the declaration mentioned the defendant pleaded *non assumpsit*, and issue was joined thereon.

Intr. Pasch. 12
Geo. B. R. Rot.
220.

The commencement of an action in an inferior court will prevent the statute of limitations from attaching upon the cause of action. S. C. 1 Barnard. B. R. 2. R. acc. 1 Sid. 228. pl. 24. Salk. 424. pl. 13. D. acc. ante 553.

And if the cause is removed out of the inferior court, and the statute of limitations pleaded to the declaration above, the plaintiff may rely in

his replication upon the proceedings in an inferior court. S. C. 1 Barnard. B. R. 2 R. acc. 1 Sid. 228. pl. 24. Salk. 424. pl. 13. D. acc. ante 553. In such case, the replication must shew explicitly that the suits in the two courts were brought for the same cause. A statement that the plaintiff for the recovery of his damages for the non-performance of the promise aforesaid (referring to the promise in the declaration) appeared in the inferior court, and then and there levied a plaint against the defendant, that the plaint was afterwards removed, and that upon the removal he exhibited his bill for the same cause of action for which he levied his said plaint, does shew explicitly that the suits in the two courts were brought for the same cause.

As to the plea to the first promise, the plaintiff replies, that it is true that the cause of action as to the first promise in the declaration mentioned *non accrevit* to the plaintiff against the defendant within six years before the exhibiting the plaintiff's bill; but the plaintiff says further, after setting out the the custom of London to hold plea of all actions of debt and other personal actions by plaint levied in the Sheriff's court there, that the cause of action as to the said first promise first accrued before the eleventh of February 1725. viz. 25 March 1720, at London aforesaid in the parish of St. Mary le Bow in the ward of Cheap; *quodque ipse praedictus*

A custom to declare in an inferior court upon an *assumpsit* soever for divers sums of money due to the plaintiff is good.

In stating the declaration in an inferior court upon such an *assumpsit* it is not necessary to set out at large the

custom which warrants that form of declaring; 'tis sufficient to allege that the party *secundum consuetudinem loci narravit*, &c. S. C. 1 Barnard. B. R. 2. The money due upon a promissory note from the maker to the payee may be recovered upon such an *assumpsit*. S. C. 1 Barnard. B. R. 2. And such an *assumpsit* may be alleged to have been brought to recover the money due on a note, altho' the sum claimed by the *assumpsit* might exceed the amount of the note. Vide Cro. Car. 294. 1 Will. 277.

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Josephus pro recuperatione damnorum suorum pro non performance promissionis et assumptionis praedictae postea scilicet undecimo die Februarii A. D. 1725, into the Sheriff's court held, &c. in propria persona sua venit, et tunc in eadem curia ibidem secundum consuetudinem civitatis praedictae levavit quendam querelam versus praesatum Danielem Atkins in placito transgressionis super casum ad damnum ipsius the plaintiff 20 l. et praedictus Josephus in eadem curia tunc et ibidem invenit plegios de proseguendo querelam suam, &c. and prayed process against the defendant secundum consuetudinem civitatis praedictae; that thereupon praescriptum fuit (ore tenus) by the Sheriff secundum consuetudinem ejusdem civitatis to the serjeant of the mace, quod ipse secundum consuetudinem ejusdem civitatis poneret per vadios et saluos plegios the said defendant Daniel, essendum ad proximam curiam dicti domini regis before the Sheriff, at, &c. 12 February 1725 tenendum, to answer the plaintiff Joseph de placito praedicto, &c. and upon a nihil habuit, &c. returned, a copias was awarded to the serjeant of mace against the defendant, returnable 17 February 1725, &c. to which a non est inventus was returned; and then sets out that the process was continued till 26 February 1725, at which day the defendant appeared, and the plaintiff then and there in eadem curia by his attorney in et super querelam suam praedictam versus praedictum Danielem secundum consuetudinem civitatis praedictae narravit modo et forma prout sequitur, scilicet, Josephus Story per J. D. attornatum suum queritur versus Danielem Atkins in placito transgressionis super casum, eo quod cum decimo die Februarii anno domini regis nunc duodecimo in parochia sanctae Helenae London, praedictus defendens indebitatus fuit praesato querenti in 20 l. pro diversis pecuniarum summis per praedictum defendentem praesato querenti prius debitis, praedictus defendens in consideratione inde tunc et ibidem assumpsit super se et praesato querenti fideliter promisit, ad solvendum eidem querenti praedictam 20 l. cum inde requisitus esset; praedictus tamen defendens, &c. et superinde the defendant praesens in eadem curia adtunc et ibidem producit a habeas corpus cum causa out of the king's bench, returnable immediate before the king's bench, &c. and then sets forth that the defendant was brought up on the habeas corpus 26 February 1725. and put in bail on the habeas corpus ad respondendum the plaintiff de placito praedicto secundum consuetudinem ejusdem curiae, as by the record of the habeas corpus and return thereof in the king's bench de recordo remanens plenius liquet et apparet; et superinde idem Josephus Story exhibuit billam suam praedictam in dicta curia dicti domini regis coram ipso rege versus praesatum Danielem Atkins modo et forma praedictis pro eadem causa actionis pro qua levavit querelam suam praedictam ut praesertur; and then the plaintiff further says, that praedicta causa actionis ipsius Josephi Story versus praesatum Danielem eidem Josepho occurrat infra sex annos ante praedictum tempus levationis querelae suae praedictae versus praedictum Danielem, scilicet, 25 March 1720, in parochia et warda praedictis ultimo mentionatis, &c. To this

this replication the defendant demurred, and prays that the plaintiff may be barred as to his action upon the first promise in the declaration mentioned, and shews for cause of demurrer, that it manifestly appears, that the said Joseph (viz. the plaintiff) did not exhibit his said bill in this court as to the said first promise, *pro eadem causa actionis pro qua levavit querelam suam in replicatione sua praedicta mentionatam, &c.* And the plaintiff joined in demurrer.

This cause was argued last Trinity term by Mr. Ketelbey for the defendant, and by Mr. Usher for the plaintiff; and this term by Mr. Reeve for the defendant, and by Mr. Blencowe for the plaintiff.

And the court was clear of opinion, that if an action is properly commenced in an inferior court within the six years, and the defendant removes it by *habeas corpus* into the king's bench, the statute of limitations will be no bar to the plaintiff in the king's bench, though six years were elapsed after the cause of action accrued, and before the removal of the suit into the king's bench. *Mich. 16 Car. 2. B. R. Brvin v. Chapman. 1 Siderf. 228. 1 Lev. 143.*

But the counsel for the defendant argued, that the plaintiff ought to have averred particularly with a *verificare vult*, that the plaint below and the bill in this court was for one and the same cause of action; which is a matter traversable, and the defendant might have took issue upon it; but here being no such averment no such issue could be took; and there is no sufficient averment, that they were for the same cause of action.

2. It appears upon this record, that the suits were for different causes of action: for the plaint below is set out to have been levied in *placito transgressionis super causam ad damnum* of the plaintiff 20*l.* and the declaration below is an *indebitatus assumpsit* for 20*l.* *pro diversis pecuniarum summis per praedictum defendantem praefato quarenti prius debitis, &c.* but the first count in the declaration here is upon a promissory note for 12*l.* 11*s.* made by the defendant to the plaintiff the twenty-fifth of March, 1720. And it was insisted upon by the counsel for the defendant, that such a declaration as was below could not be good, because the plaintiff ought to shew, for what the money was due, as money lent, &c. for the defendant might be indebted to the plaintiff for sums of money owing by him to the plaintiff, for which an *indebitatus assumpsit* would not lie, as on a bond, &c. and the saying that he declared *secundum consuetudinem civitatis praedictae*, was not sufficient; for if upon such a general declaration the party could recover contrary to the rules of the common law, such custom ought to be set out specially; as in case of a *concessit salvere*, a custom to recover

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(a) Acc. ante
757-

recover upon it must be set out specially. *Raff. Intr.* 550. In the next place it was insisted on, that this promissory note could not be given in evidence to maintain the declaration, if it should be took to be for money lent; for though before the act of 3 & 4 Ann. c. 9. a (a) promissory note might be given in evidence on an *indebitatus assumpsit* for money lent; yet since that statute those notes are made negotiable, and an action will lie on the note itself, and the consideration shall not be inquired into; and the note itself is now a security for a debt, whereas before it was but an evidence of a debt. That an *indebitatus assumpsit* does not lie on a bill of exchange, by *Powell* justice, which the other justices did not deny. 2 *Lutw.* 1594, in the case of *Bellasis v. Hester.* 1 *Lev.* 298. 1 *Ventr.* 152. *Brown v. London.* *Hard.* 487. 1 *Mod.* 286. *Milton's case.* And therefore they concluded, that it appeared on the record, that the suit below and the action here were for a different cause of action.

The judges all agreed, that such a general *indebitatus assumpsit pro diversis pecuniarum summis per praedictum defendentem praefato querenti prius debitis*, without shewing for what the money was due, as money lent, &c. would be ill in the courts in *Westminster hall*, and not maintainable, because the money might be owing for what an *indebitatus assumpsit* would not lie, as for rent upon a bond, &c. But then *Raymond* chief justice, and *Reynolds* and *Probyn* justices, held that an action brought on a promissory note against the person who signed it, payable to the plaintiff or order, for value received, and an action brought against him on an *indebitatus assumpsit* for money lent, might be averred to be the same cause of action; for they were of opinion, that in the action on the *indebitatus assumpsit* for money lent, such promissory note might be given in evidence, and would be good evidence to maintain the declaration. That such notes were allowed in evidence in such *indebitatus assumpsit* before the statute of 3 & 4 Ann. c. 9. is most certain, and before that act an (b) action would not lie upon the note; then they held, that the statute had only given an action upon the notes, and made them negotiable, which they were not before, but had not at all altered the nature of the debt; and therefore *Pasch.* 7 *Geo. B. R.* between *Comer and Wain, Str.* 426. *indebitatus assumpsit* brought for money lent, the defendant pleaded he had given the plaintiff a promissory note signed by him, payable to the plaintiff for that sum of money; and upon a demurrer it was adjudged for the plaintiff, because the note did not extinguish the debt, is not being of a higher nature than the promise for payment of the money; for the statute had not altered the nature of the debts, nor made the note of a higher nature than a debt on simple contract, nor could it have any preference in payment by an administrator before other debts.

(b) Acc. ante
757, 774, 825.
6 *Mod.* 29.

debts upon simple contract. And it is held, 1 Salk. 23. *Hard's case*, Hil. 8 W. 3. that an *indebitatus assumpsit* will lie against the drawer of a bill of exchange, because he was really a debtor by the receipt of the money. And 2 Lutw. 1585. in the case of *Bramwich v. Lloyd*, the chief justice Treby said, that upon an *indebitatus assumpsit* a bill of exchange may be given in evidence, to maintain the action; and Powell justice said, that on an *indebitatus assumpsit* for money received to the plaintiff's use, such a bill may be left to the jury, to determine if it was for value received or not. But this must be understood of *indebitatus assumpsit* brought against the drawer, not against the acceptor, for an *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange; and the cases cited of 2 Lutw. 1594. *Bellasis v. Hester*, and 1 Ventr. 152. are in cases of actions brought against the acceptor; and so is *Hardr.* 487. that debt will not lie against the acceptor of a bill of exchange.

But Fortescue justice said, he had never known a bill of exchange given in evidence on an *indebitatus assumpsit* for money lent, nor a promissory note since the statute of 3 & 4 Ann. c. 9. and therefore he was doubtful, whether it could be given now in evidence in such *indebitatus assumpsit*; for before that act the note was but evidence, on which no action could be maintained, but by that act the note is made a security for the money, upon which an action will lie, and the consideration of the note shall not be inquired into. And the action upon the note is grounded upon a statute, but the *indebitatus assumpsit* is an action at common law; and therefore he was doubtful, whether they could be said to be the same cause of action. And he cited the opinion of Hale chief justice, as reported 1 Ventr. 252. *A.* in consideration that *B.* would marry his daughter, promised to pay 100*l.* and in an action brought, the plaintiff was barred; and in another action brought the promise was laid to pay 100*l.* at request, and held it could not be averred to be the same. To which the chief justice answered, that in that case the first promise was upon a particular consideration, viz. marriage of his daughter; and in the second there was no consideration at all, and therefore it was but *nudum pactum*, and no action would lie upon it: however, the consideration not appearing, it could not be averred to be the same cause of action with the first.

But then the question was, whether such a declaration as is set out in the plaintiff's replication to have been in the sheriff's court, could be good by custom; and if it could, whether that custom ought not to be specially set out; and whether the averment was sufficient, that the suit here and the suit in the sheriff's court were for the same cause of action? It being (a) settled, that by custom an action might be

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be maintained on a *concessit solvere*, the judges held, that there is the same reason, that by custom an action may be maintained on an *assumpsit solvere*, and money lent given in evidence; in both the manner of declaring being in substance the same, viz. in the first, that the defendant *concessit solvere* to the plaintiff 60*l.* *pro diversis denariis summis* to the plaintiff by the defendant *prius debitis solvendis*. 1 Ro. Ab. 564. pl. 21. and in this, that the defendant *indebitatus fuit* to the plaintiff in 20*l.* *pro diversis pecuniarum summis per praedictum defendentem praefata querenti prius debitis*, praedictus defendens in *consideratione inde tunc et ibidem assumpsit et eidem querenti promisit ad solvendum* to the plaintiff the said 20*l.* &c. And the action on the *concessit solvere* is liable to all the same objections as this *assumpsit solvere* is. In the next place they held, there was no more occasion to set out the custom at large in this case, than in the *concessit solvere*, in which case it has been adjudged, the custom need not be set out at large, but declaring *secundum consuetudinem*, &c. was sufficient. Mich. 29 Eliz. B. R. Houtier's case. 4 Leon. 105. And Fortescue justice said, it had been not long since adjudged in this court between Stevens and Britland, that there is no necessity to set out the custom at large in a *concessit solvere*, but laying it to be *secundum consuetudinem*, &c. was sufficient.

Then as to the averment, they were of opinion, that the plaintiff has sufficiently averred, that the suit here and the plaint levied in the sheriff's court were for the same cause of action. For the defendant's plea of the statute of limitations is pleaded as to the first promise in the declaration, which is the count upon the promissory note, and prays judgment if the plaintiff can maintain his action as to the said first promise; the plaintiff replies, and says, he ought not to be barred of his action as to the said first promise, because he (after setting out the custom to hold the sheriff's court) *pro recuperatione damnorum pro non performance promissionis et assumptionis praedictae*, scilicet, 11 February, 1725, at the court held before the sheriff, &c. in propria persona venit, and then and there in the said court *secundum consuetudinem civitatis praedictae levavit quandam querelam suam* against the defendant in *placito transgressionis super casum ad damnum* of the plaintiff 20*l.* (which had been sufficient, if he had not declared below, but the defendant had removed the cause before declaration) then he goes on, and sets out the process awarded, the arrest, the appearance, and that in *et super querela praedicta* against the defendant *secundum consuetudinem civitatis praedictae* he declared as before, and then sets out the *habeas corpus*, and bail on the return of it to answer the plaintiff *de placito praedicto secundum consuetudinem ejusdem curiae*; and that thereupon the plaintiff exhibited his said bill in the king's bench against the

the defendant, *modo et forma praedictis, pro eadem causa actionis pro qua levavit querelam suam praedictam, ut praesertur, &c.* And judgment was given for the plaintiff November 11 in this term.

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Mr. Justice Fortescue Aland *vers.* Aland Mason.

S. C. Str. 861.

Intr. Trin.
11 Geo. B. R.
Rot. 477.

MR. justice Fortescue Aland brought a writ of error returnable in the court of king's bench in England, to reverse a judgment given by the court of king's bench in Ireland, upon a writ of error brought by the plaintiff returnable in that court, to reverse a common recovery suffered in the court of common pleas in Ireland, and also to reverse the said common recovery. The writ of error returnable in the king's bench in Ireland set out, that Henry Aland senior by deeds of lease and release dated 2 & 3 June 1681 conveyed the lands, of which the common recovery was suffered, to the use of himself for life without impeachment of waste, remainder to Jonathan Aland second son of the said Henry Aland for life without impeachment of waste, remainder to the first son of Jonathan Aland in tail male, remainder to all the other sons of the said Jonathan in tail male, remainder to Henry Aland junior for life, remainder to trustees and their heirs in trust to preserve contingent remainders, remainder to the first and all other sons of the said Henry Aland junior in tail male, with other *mesne* remainders not necessary here to be mentioned, because they were determined, remainder to the plaintiff by the name of John Fortescue, second son of Edmund Fortescue of London and Sarah his wife then deceased, who was eldest daughter of Henry Aland for life without impeachment of waste; that Henry Aland senior died without leaving any other issue male than Henry Aland junior and Jonathan: then it sets out a common recovery suffered of the lands settled as aforesaid, Pasch. 2 Jac. 2. in the common pleas in Ireland, wherein William Young was demandant, Arthur Towers and Richard Smith tenants, and Jonathan Aland vouchet, who vouched the common vouchet, and judgment given, and an *habere facias seisinam* awarded, returnable Trin. 2 Jac. 2. which was returned executed; that Jonathan Aland died without issue male, and Henry Aland junior died without issue male, and the other intervening remainders, upon which the plaintiff's remainder was expectant, were determined: and then the plaintiff assigns the general error in the recovery, and prays a *scire facias* to Aland Mason grandson and heir of John Mason, which is granted, as also a *scire facias* against the terre-tenants of the lands in the recovery. After a *scire facias* returned as to the heir and terre-tenants, the

A defendant in error cannot plead to the assignment of errors the same matter upon which the judgment below was given in his favor. S. C. 1 Barnard. B. R. 5. Str. 861. Fitzg. 116. vide T. Jon. 181. Raym. 461.

To a writ of error to reverse a common recovery if the defendant pleads nonage, and has judgment that the parcel should demur, he cannot plead it again to a writ of error to reverse that judgment and the recovery. Upon the second writ of error the judgment on the first writ of error shall be considered before the recovery, and if that judgment is affirmed the recovery shall not be meddled with. Vide Str. 225.

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heir being an infant appears by his guardian, and the terre-tenants appear by attorney; and after an imparlance the infant prays *oyer* of the *scire facias* and of the return, which being granted, he pleads, that after the making the said indentures of lease and release, the said Henry Aland, at, &c. 31 August 1681 died without any other issue male than the said Henry Aland junior and Jonathan Aland; that afterwards Henry Aland junior died at, &c. 31 July 1683 without any issue male of his body, and the said Jonathan Aland survived him, and the said Jonathan Aland was seised of all the said lands, &c. in his demesne as of fee, and afterwards viz. 21 August 1691 died at, &c. seised in fee *habens exitum* Sarah Aland daughter and heir of Jonathan Aland, and after his death all the said lands, &c. descended to the said Sarah Aland, as daughter and heir of Jonathan, and the said Sarah *ratione descensus illius* into the said lands, &c. did enter, and was seised in her demesne as of fee; and being so seised, 20 October 1714 died at, &c. seised of the said lands, &c. in her demesne as of fee, *habens exitum praedictum* Aland Mason *filium et haereditatem praedictae* Sarah, after whose death the said lands, &c. descended to the said Aland Mason as son and heir of the said Sarah, and the said Aland Mason *ratione descensus illius* into the said lands, &c. *intravit et fuit et est inde seistus in dominico suo ut de feodo*; and the said Aland Mason being so seised, *dicit quod ipse est infra aetatem viginti unius annorum, et non intendit quod durante minori aetate sua praedictus the plaintiff procederet, Anglia should proceed, et petit quod brevis de errore praedictum et loquela supradicta remaneant usque ad aetatem unius et viginti annorum ejusdem Aland Mason, et quod the plaintiff ulterius in brevi de errore praedicta et loquela praedicta non procedat versus praedictum Aland Mason donec pervenerit ad suam aetatem unius et viginti annorum.* To which plea the plaintiff says, *quod placitum praedicti Aland Mason superius placitatum materiamque in eodem contenta minus sufficientia in lege existunt ad ipsum the plaintiff ab brevi de errore praedicta et loquela praedicta procedendo versus the said Aland Mason donec pervenerit ad suam plenam aetatem unius et viginti annorum praeccludendum, &c.* and prays that the judgment aforesaid, *ob errores in recordis et processu praedicta revocetur adnulletur et penitus pro nullo habeatur, &c.* The defendant Aland Mason by his guardian joins in demurrer, and prays, *quod brevis de errore praedictum versus eum non procedat, donec pervenerit ad plenam aetatem unius et viginti annorum.* The terre-tenants pray *oyer* of the *scire facias* and return, after having which they plead, that the said Aland Mason *die impetravit praedicti brevis de scire facias, et diu antea, fuit et nunc est tenens ut de libero tenemento* of the said lands, &c. and of every part thereof in the said writ of *scire facias* mentioned; *absque hoc* that they or any of them the day of suing the said *scire facias*, or at any time after, were or was tenant

tenant *ut de libero tenemento* of the said lands, &c. in the *scire facias* mentioned, or of any part thereof, as by the return of the said *scire facias* is supposed; and this they aver, &c. and pray judgment of the said writ of *scire facias* and the return thereof. And after several continuances the court of king's bench gave judgment, *quod loquela praedicta super breve de errore praedictum remaneret ad aetatem praedicti Aland Majon, &c.* The writ of error returnable in the king's bench in *England* sets out this whole record of the writ of error returnable in the king's bench in *Ireland*, and then Mr. justice Fortescue plaintiff in error assigns his errors in person in the common recovery in the common pleas in *Ireland*, viz. that the original ought to have been abated, and also in the judgment of the king's bench in *Ireland*. To this the defendant by guardian pleads his nonage, and that he is but of the age of thirteen and no more, and prays, that proceedings may stay on this writ of error, until he attains the age of twenty-one years. To which the plaintiff in error demurs, and prays, that the court will proceed to examine the errors assigned, and reverse both the judgments, &c. The defendant joins in demurrer.

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Last Trinity term this was argued by Mr. Filmer for the plaintiff in error, and by Mr. serjeant Darnall for the defendant in error. Mr. Filmer said, that this plea was in nature of a plea in bar of the writ of error, and to hinder this court from examining the judgment of the court of king's bench in *Ireland*, to see if it was rightly given. The judgment there was upon the defendant's pleading his nonage, that the proceedings on the writ of error should stay, till he attained his age of twenty-one years; then when the defendant pleads here his nonage to this writ of error, he falls within the known rules, that *non debet adduci exceptio ejus rei cujus petitur dissolutio*; for the allowance of his age by the king's bench in *Ireland* is the very grievance complained of in this writ of error here; and yet that nonage is insisted on, to hinder this court considering, whether that plea was justly allowed in *Ireland*. If a man is outlawed after judgment, and he brings a writ of error, as well to reverse the outlawry as the judgment; a plea of that outlawry to the disability of the person of the plaintiff in error will not be good, but the court will examine the errors, 7 Hen. 6. 44. Bro. Error 70. Co. Litt. 128. And if this plea should be allowed to hinder the proceedings upon the writ of error, and the judges from looking into the judgment of the king's bench in *Ireland*, let that judgment be ever so erroneous, it could not be looked into, till the defendant in error has had the full benefit of the judgment, for that judgment is only to stay, &c. till he comes to twenty-one. And that this court should be hindered from examining the judgment, by pleading that matter, the allowance whereof is complained of to be the very error in the judgment below, would be very absurd.

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But in maintenance of the plea Mr. serjeant *Darnall* insisted, that if the defendant had joined in the assignment of errors, he would thereby have waved the benefit of his age; for this court could not take notice, whether he was under age or not, nor when he came of age; what his age was, when he pleaded in *Ireland*, would not be material; but whether he was now under age or not; for if he was now under age this court ought not to proceed to examine the errors, this writ of error being brought to reverse the common recovery as well as the judgment of the king's bench in *Ireland*.

And this *Michaelmas* term Nov. 17th Mr. *Williams* for the defendant in error farther argued, that the writ of error being to reverse the common recovery, as well as the judgment in the king's bench in *Ireland*, the defendant in error might have several things to plead since the judgment in *Ireland*, as a release, &c. which the court will not put him to plead during his infancy, lest he might be prejudiced by his mistake; and therefore this plea was a good plea. He insisted also upon the antiquity of the common recovery, which was suffered 2 Jac. 2. the long enjoyment of the land under it ever since; and relied much upon the case of *Herbert v. Brown*, Cro. Jac. 392. where in error brought to reverse a fine levied by the plaintiff's husband and herself, and error assigned; the defendant in error pleaded a descent to him of the lands, and that he was terre-tenant, and pleaded that he was within age, and prayed that the *parol* should demur: the plaintiff counterpleaded the age, that she was intitled to dower before the fine, and this fine only barred her, wherefore she sued this writ of error to be restored to her writ of dower; and upon demurrer to this counterplea it was adjudged, the *parol* should demur: which shews the great care the law takes of infants. Although the person the infant had to contend with was one deemed a great favourite of the law, and that the writ of error in that case was only brought to reverse the fine in order to restore her to her writ of dower, and nonage would be no plea in a writ of dower; yet the *parol* in that case was to demur, till the infant came of age. And he insisted, that that case was in a manner the same as this. He argued farther, that though the same plea was pleaded to the writ of error in the king's bench in *Ireland*, yet it might be informally pleaded; and it would be hard the infant should suffer for informal pleading, and therefore it was but reasonable and just, to allow him to plead his infancy to this writ of error. Mr. *Fazakerley* was going to answer Mr. *Williams* for the plaintiff in error, but the justices being clear of opinion, they stopped him. And the chief justice, and *Reynolds* and *Probyn* justices (*Fortescue* justice being absent, it being his own cause) held it could not be sufficient to hinder this court from considering of the judgment given by the king's bench in *Ireland*. The first thing

thing to be considered upon this writ of error is, whether the judgment that the *parol* shall demur for the nonage of the defendant in error is good; if it is, it will be affirmed, and the errors in the recovery cannot be looked into; yet if it is not, it ought not to be affirmed; if it is affirmed, the defendant will have the same advantage as if this plea had been allowed; but if it ought not to be affirmed, by reason it is not pleadable, it would be very strange, that it should be allowed here, only to make the plea below good, when it is not. The consequence of allowing such plea will be, to let the party have the intire benefit of an erroneous judgment. For suppose in dower upon a plea of nonage the court should give judgment the *parol* should demur, yet if error is brought on that judgment, and the defendant should plead the same plea here, and it must be allowed, the party would have the whole benefit of the erroneous judgment; because till he comes of age, by the allowing the plea here, it could not be considered, whether the judgment below was right or wrong, and when he is come of age the defendant has had the whole benefit of the erroneous judgment below, which was only, that the *parol* should demur till he came of age. This seems to fall directly within that rule of *non debet adduci exceptio ejus rei cujus petitur dissolutio*, and the cases cited which have been adjudged upon that principle. If the defendant had joined in the assignment of errors, he would not thereby have waived the benefit of his nonage, because that is adjudged to him by the court of king's bench in *Ireland*. The case cited by Mr. *Williams* does not come up to this, because that was upon plea of nonage to the first writ of error, which was allowed, and well; but to bring it to this case, that should have been of the same plea of nonage to a writ of error brought upon the judgment which allowed the nonage in the first writ of error. Judgment was given Nov. 17, that the defendant in error should answer to the errors assigned. (a)

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(a) The judgment in *Ireland* was afterwards affirmed. Vide Str. 362. Fitzg. 114. Barnard. B. R. 100. 231. 233.

Goodright *vers.* Pullyn et al'.

C. Str. 739. 1 Barnard. B. R. 6. 2 Eq. Abr. Devises D. pl. 26. 1st ed. P. 315.

THE plaintiff brought an ejectment for several messuages and lands in *Islington* on the demise of *Edward* *Isle*. On not guilty pleaded, the jury found the defendants not guilty as to part of the premises; and as to the rest they

Intr. Hil.
10 Geo. B. R.
Rot. 524.

A limitation in a will to the heirs males of the body of a man to whom the will gives an estate for life in the premises

is in the ancestor. Vide *Fearne* 3d ed. 21 to 143. 2 Willf. 322. notwithstanding the premises are given to him expressly for life, notwithstanding the words "his heirs for ever" are superadded to the limitation; and notwithstanding the next limitation over is made expressly "if the ancestor shall die without such heir male." Under a devise to *A.* for life, and after his decease to the heirs males of the body of the said *A.* and his heirs for ever, but if *A.* shall die without such heir male, remainder over, *A.* takes an estate tail.

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found a special verdict; that *Nicholas Lisle* was seised in fee of the premises in question, and being so seised 23 April 1694 duly made and published his last will; and thereby devised the premises in question to *Mary* his wife for life, and after her decease then he devised the same to *Nicholas Lisle* son of *Kendrick Lisle* for his life, and after the decease of the said *Nicholas* he devised the same unto the heirs males of the body of the said *Nicholas* lawfully to be begotten and his heirs for ever; but if the said *Nicholas Lisle* should happen to die without such heir male, then he devised them to *Edward Lisle* of *Holt* for life, and after his death to and for the use of the heirs male of the body of the said *Edward Lisle* lawfully issuing and his heirs for ever; and for default of such heir male he devised them to *Charles Croke Lisle* in fee: then they find, that *Nicholas Lisle* the testator died seised, &c. 20 May 1694: that after his death *Mary* his wife entred and was seised for life, and died 1694. That after her death *Nicholas* the devisee entred and was seised according to the said will, *prout lex postulat*: that the 20th of June 1701 *Edward Lisle* of *Holt*, the devisee in remainder, had issue *Edward* his eldest son and heir, the lessor of the plaintiff: that *Edward* the father died in 1722: then they find that *Nicholas Lisle* the devisee by indentures of lease and release dated the 9th and 10th of June 1704 made a tenant to the *praecipe*, in order to suffer a common recovery, &c. of the tenements in question; and they find the recovery suffered accordingly, in which the said *Nicholas Lisle* was vouched, and vouched the common vouchee; which recovery was to the use of the said *Nicholas Lisle* in fee: that he 1 April 1720 died without leaving any issue of his body seised, &c.

The question upon this special verdict, which was found before the late lord chief justice *Pratt*, was whether *Nicholas Lisle* the devisee took an estate tail or an estate for life only by the will; if he took but an estate for life, the lessor of the plaintiff had a good title; but if he took an estate tail, then *Nicholas* by the common recovery barred the remainder devised by the will, under which the plaintiff claimed, and he had no title, but judgment ought to be given for the defendants.

Mr. *Bootle* for the plaintiff argued, that *Nicholas* took an estate for life only. The testator intended him only an estate for life, because he has devised it in express words to him for his life; and although the next devise is to the heirs males of his body, which generally speaking are words of limitation, and not of purchase, yet by the tenor of this will the testator designed them words of purchase, to be a description of a person, the same as if he had said *son*, because it goes on and devises the lands to his heirs for ever. What is that? that is the person described under the words *heirs male*, which shews he intended but one person, since he

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the word *his*. Then he goes on and says, that if *Nicholas* should happen to die without such heir male, again in the singular number, and manifests the design by the words heirs males to describe a person who should take by purchase; and therefore he said this was *Archer's* case, 1 Co. 66. b. devise to *Robert Archer* for life, and after to the next heir male of *Robert*, and to the heirs male of the body of such next heir male: adjudged *Robert* took but an estate for life. Now here the words *his* and *without such heir male* are as certain, and make as good a description, as next heir male. He cited also 1 *Rel. Abr.* 137. pl. 13. If *A.* devises to *B.* his eldest son for life, the remainder to the sons of *B.* lawfully to be begotten, and if they alien, his daughters shall have the same estate, remainder to his right heirs; *B.* has but an estate for life, and not an estate tail, but his son shall have by purchase. He compared this case likewise to *Wild's* case, 6 Co. 17. where 'tis held, if lands are devised to *A.* and his children, and *A.* has no children at the time of the devise, it is an estate tail in *A.* but if the devise is to *A.* and after his decease to his children, there *A.* takes but an estate for life, and every child he has after may take by way of remainder. Therefore he concluded, *Nicholas* took an estate for life only.

Mr. *Fazakerley* for the defendant argued, that the intent of the party could not controul the settled rules of law. And therefore in the case of *King v. Melling*, 2 *Lev.* 59. *Vent.* 214. 225. the devise was to *B.* for life, and after to the issue of his body by his second wife, with power to make a jointure. There was the same inference made as to the intent of the deviser, that *B.* should take but an estate for life, and stronger, because a power was added to make a jointure, which was unnecessary, if he was intended to be tenant in tail; the devise over was to the issue, which is not properly a word of limitation; and yet it was held to be an estate tail in *B.* No rule is more known, than where an estate is given to a man for life, and afterwards to his heirs males, that makes an estate tail. But 'tis objected, that the word *his*, and for default of such heir male, qualify the words heirs males, and make them only a description of a person, and the same if he said next heir male, as in *Archer's* case. But as to that he answered, then only one son of *Nicholas* could take, which can never be supposed to be the intent of the deviser. In the next place the words heirs males must be rejected; but no words ought to be rejected, if they can all stand in a will, as they may in this case, if heirs males are construed words of limitation; for *his* heirs may properly in grammar import the heirs of *Nicholas* the devisee; and then for default of such heir male will refer naturally to the heirs male mentioned before; so that all the words will stand. But by the other construction the words heirs males must be rejected. In the case of *Backhouse v.*

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Wells, which was adjudged *Hil. 12 Ann. B. R. 1 Eq. Ar. Devises. D. pl. 27. 4th ed. p. 184. 10 Mod. 181. Gilb. Law and Equity 20. 129. Fort. 133. Thomas Barker* devised to *John Barker* for life only, without impeachment of waste, and after to his issue and the heirs males of the body of such issue, and if he die without issue, &c. it was adjudged that *John Barker* took an estate only for life; but *Mr. Fazakerley* said, that the earl of *Macclesfield*, who delivered the opinion of the court said, if the devise had been instead of issue to the heirs males of the body of *John Barker* &c. it would have been otherwise. He cited the case of *Atkins v. Atkins, Cro. Eliz. 248. Moor 503. pl. 801.* as an apposite case; where the devise was to *S.* and the heirs of his body, and after the decease of *S.* (not saying without heirs of his body) he wills the land should remain to *B.* eldest son of *S.* and the heirs of his body, with remainder to three other sons of *S.* in the same manner: that was adjudged an estate tail in *S.* notwithstanding after his decease the devise was to *B.* and the three other sons, because those were not special nor particular enough to alter the devise before to *S.* and the heirs of his body. So here, the words *his* and *without such heir male* cannot alter the former devise to *Nicholas* for life, and after his decease to the heirs of his body, which made an estate tail as much as a devise to *Nicholas* and the heirs male of his body.

The judges were all unanimous of opinion, that this was an estate tail in *Nicholas Lisle* the devisee. For if lands, &c. are devised to *A.* for life, though the words without impeachment of waste are added, or with (a) a power to make a jointure, and after his decease to his heirs males, *A.* thereby takes an estate tail. And this is settled so firmly since the case of *King v. Mellings, 2 Lev. 59.* that it is not to be disputed; for the word heirs is properly a word of limitation, and not of purchase. But the words issue male or female are not properly words of limitation; and therefore if lands, &c. by deeds are conveyed to *A.* and his issue male, or issue female, he takes no estate in tail: but in a will, a devise to *A.* for life, and after his decease to his issue, without more, will carry an estate tail to *A.* So that issue is sometimes a word of purchase, sometimes of limitation according to the different penning of the will. Then they held, the subsequent words relied upon for the plaintiff, as *his*, and *if he dies without such heir male*, are not sufficient to restrain and alter the operation of the words heirs males, and so qualify them, as to make them a description of the person. *Fortescue* justice thought *his* in grammatical construction would properly refer to *Nicholas*, but as to that the other judges gave no opinion. But they all held, that the operation of plain and clear words, and a settled rule of law, should not be defeated, or broke into, by uncertain or doubtful words, which they took the last at least to be.

(a) Vide ante
873.

But in effect the words heirs males must be rejected, to make this an estate for life only in *Nicholas*. And therefore judgment was given for the defendant, Nov. the 18th, 1726.

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Crockatt *vers.* Jones.

Intr. Mich. 13
Geo. B. R.

S. C. Str. 734.

IN case upon a promissory note payable to *B.* or order, signed by the defendant, and indorsed to the plaintiff; the defendant pleaded the statute of limitations; the plaintiff replied, a *latitat* sued out within the six years, and regularly continued, &c. to which there was a rejoinder, and a demurrer to the rejoinder. Which being held ill, serjeant *Chapple* objected for the defendant, that the plaintiff ought to have shewn a bill of *Middlesex*, as a foundation of the *latitat*, the *latitat* referring to it. But adjudged, the replication of the *latitat*, without shewing a bill of *Middlesex* precedent, was sufficient to avoid the statute. And so it was adjudged, *Mich. 9 Geo. B. R. Hollister v. Coulston. Str. 550.* See *Stiles 156. 1 Sid. 53, 60.* Judgment for the plaintiff, Nov. 18, 1726.

To a plea of the statute of limitations, if the plaintiff replies that he sued out a *latitat* within the time prescribed by the statute, he need not shew that there was a bill of *Middlesex* precedent.

Graddell and others *against* Tyson.

Intr. Pasch. 12
Geo. B. R. Rot.
307.

ERROR upon a judgment given in the common pleas after verdict in debt upon a bond against *Tyson*. The record returned was thus, *Ebor. ff. Anna Graddell vidua, Maximilianus Nelson, et Galfridus Prescott, executores testamenti et ultimae voluntatis Christophori Graddell, qui quidem Christophorus et quidam Johannes Westby etiam defunctus fuerunt executores testamenti et ultimae voluntatis Dorotheae Westby defunctae, quem quidem Johannem praedictus Christophorus super-vixit, per Willielmum W. attornatum suum queruntur de Willielmo Tyson, jun. gen. uno attornatorum curiae domini regis de banco hic praesenti in curia in propria persona sua, de eo quod non reddidit eisdem the plaintiffs 200 l. and declare on a bond entered into by the defendant Tyson to Dorothy Westby, &c.* The defendant after oyer of the bond, and condition, which was to pay money, pleaded payment; and issue being joined thereon, verdict and judgment were given for the plaintiff. The errors assigned by *Tyson* plaintiff in error were, that judgment was given for the plaintiff, where it ought to have been given for him, and that the declaration was insufficient in law, &c.

Upon the general assignment of errors in an action against an attorney as such it cannot be objected that it does not appear that the action was commenced either by original writ, bill, or attachment of privilege.

Y 4

Mr.

GRADDELL

TYSON.

Mr. *Strange* for the plaintiff in error insisted, that all actions in the common pleas must be either by original writ, or original bill, or attachment of privilege; but this action does not appear to have been by any of these ways, for which reason the proceedings are irregular. And in the like case for that reason judgment was given against the plaintiff in the common pleas by that court, *Dimock v. Wetheral*, 1 *Lutw.* 227, 228. And therefore he prayed, the judgment might be reversed. *Sed non allocatur per curiam*; for this being before this court upon a writ of error, they cannot take notice, whether there was any original bill or not, the defendant being sued as attorney, it not being assigned for error, that there was no original bill. But in order to have taken advantage of this, the plaintiff in error should have assigned for error, that there was no bill, and took out a *certiorari*, and got it returned, that there was none. Judgment affirmed, Nov. 9, 1726.

Intr. Trin. 12
Geo. B. R.William Dawson *vers.* John Burridge, Esq.

S. C. Str. 734. 1 Barnard. B. R. 7.

Members of
parliament may
be sued in C. B.
by bill.

THE defendant *Burrige* brought a writ of error upon a judgment given against him in an action on a promissory note by *nil dicit*, and a writ of inquiry executed, and final judgment given for 379*l.* 14*s.* And the record of the common pleas was thus, viz. *Memorandum, quod 28 die Maii de termino sanctas Trinitatis ultimo preterito* [Note, the record in the common pleas was of *Michaelmas* term, 13 Geo. rot. 773] *venit hic in curiam Willielmus Dawkins, gn. per Johannem Ellison attornatum suum et exhibuit iusticiarii domini regis de banco quandam billam suam versus Johannem Burridge armigerum, eodem Johanne Burridge habente privilegium parliamenti cujus quidem billae tenor sequitur in hac verba, scilicet, Willielmus Dawkins per J. E. attornatum suum queritur de Johanne Burridge nuper de Westmonasterio in comitatu Middlesex armigero habente privilegium parliamenti, pro eo, viz. quod cum, &c.* And so the declaration goes on, and the rest of the record of the common pleas is returned, and general errors are assigned. And Mr. *Reeve* for Mr. *Burrige* the plaintiff in error, insisted, that the common pleas could not hold plea in this case against members of parliament by bill; which depends upon the words of the statute of 12 & 13 W. 3. c. 3. s. 2. which are these: "And if any person
"or persons, having cause of action against any of the
"knights, citizens or burgeses, or any other person in-
"titled to privilege of parliament, after any dissolution,
"prorogation, or such adjournment as aforesaid, or before
"any sessions of parliament, or meeting of both houses as
"aforesaid,

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“aforesaid, such person or persons shall and may prosecute
 “such knight, citizen or burghers, or other person intituled
 “to privilege of parliament, in his majesty’s court of king’s
 “bench, common pleas, or exchequer, by summons and
 “distress infinite, or by original bill and summons, attach-
 “ment and distress infinite thereupon to be issued out of any
 “of the said courts of record, which the said respective
 “courts are hereby impowered to issue against them or any
 “of them, until he or they shall enter a common appear-
 “ance, or file common bail to the plaintiff’s action, ac-
 “cording to the course of each respective court.” And
 Mr. *Reeve* for the plaintiff in error argued, that this act did
 not intend to give a power to the common pleas to hold plea
 by bill, which could not do so before; but that the act was
 to be understood distributively, *i. e.* that such court as could
 hold suit before by original, might hold plea by original to
 be sued against a member of parliament; and such as held
 plea by bill, might hold plea by bill against a member of
 parliament. And that this was the meaning of the act,
 appears by the end of the clause, where it is said, accord-
 ing to the course of each respective court. The printed act
 he thought was misprinted, by putting the *comma* after the
 word bill, and so joining the words, original bill, together;
 for in the parliament roll there are no stops nor *comma*’s,
 and therefore it was the printer, that put the *comma* after
 original bill, whereas there should be a *comma* between origi-
 nal and bill, the parliament intending thereby two several
 things, and not one, as now in the printed act, and that
 what has hardly been heard of, an original bill, an expres-
 sion not used in the law. *Sed non allocatur*; for *per curiam*,
 the intent of the parliament must be collected from the
 words, and the words are plain and express, that a member
 of parliament may be sued either in the king’s bench, com-
 mon pleas or exchequer, by summons and distress infinite
 (which refers to proceedings by original writ) or by original
 bill and summons, attachment and distress infinite, there-
 upon to be issued out of any of the said courts, which the said
 respective courts are impowered to issue against them. Then
 the words, according to the course of each respective court,
 refer only to entering the common appearance, or filing
 common bail: then by the *proviso* at the end of the act,
 whereby it is provided, that nothing in that act should give
 any jurisdiction or power to any court to hold plea in any
 real or mixt action, in any other manner than such court
 might have done before the making that act, they designed
 to give a jurisdiction to hold plea in personal actions, in an-
 other manner than they could have done before. Judgment
 was affirmed, Thursday, November 24, 1726.

Higgins *vers.* Jennings.

In trespass for erecting a wall, there shall be no more costs than damages if the damages are under 40 s. unless the right to the land upon which the wall was built came in question.

In trespass for entering a close, if the defendant justifies under a right of way, and the plaintiff replies *extra viam*, upon which issue is

joined, he shall have full costs, tho' the damages are under 40 s. S. C. Str. 726. R. acc. Str. 1168.

Adm. Gibb. Rep. 199. sed vide Cochran v. Harrison. B. R. Tr. 22 G. 3.

IN trespass for breaking and entering his close, and treading his grass, and erecting a wall upon the plaintiff's ground; the defendant as to all the trespasss, but entering the close and treading down the grass, pleaded not guilty; upon which issue was joined: and as to the entering the close and treading down the grass, the defendant justified under a right to a way, &c. The plaintiff replied, *extra viam*; and issue was joined thereon, and both issues were found for the plaintiff, but the jury gave damage under 40 s. And Mr. serjeant Girdler moved for the plaintiff, for direction to the master to tax full costs. And first, he insisted, that the defendant being found guilty of erecting a wall on the plaintiff's ground, though the damage was under 40 s. that would intitle the plaintiff to full costs, because the title might come in question upon it; and cited 1 Salk. 193. *Blackley v. Try*, where *Holt* chief justice is reported to have said, if a trespass is done *clamando titulum*, or the title may come in question, there shall be full costs. 2. As to the issue which is found for the plaintiff on the *extra viam*, he said, the right to the way on the plaintiff's land must come in question on the issue, *viz.* of what extent it is, *viz.* of ten or twenty feet breadth; and cited 2 Lev. 234. *Asher v. Finch*, as the very case in point.

Mr. *Willes* for the defendant urged, that by the express words of 22 & 23 Car. 2. c. 9. s. 136. in actions of trespass, wherein the judge at the trial of the cause shall not certify, &c. that the freehold or title of the land in the plaintiff's declaration was chiefly in question, the plaintiff shall recover no more costs than damage, if the jury give damage under 40 s. Now in this case the judge has not certified. And it was adjudged, 2 Vent. 48. that in trespass for putting stakes upon the plaintiff's ground, and erecting a wall is of the same nature, the plaintiff should have no more costs than damages, the damage being under 40 s.

Then he said, as to the other issue, the plaintiff by his replying *extra viam*, did admit the defendant had a right to a way over his ground, so that the right to the way could not come in question on the issue *extra viam*: and then there was no more reason, that the plaintiff should have full costs, than if he had a verdict on not guilty. The court took time to consider of it; and on another day the chief justice and Mr. justice *Reynolds* said, they were of opinion, that as to the verdict on the not guilty, though the defendant was found guilty as to the erecting a wall, yet since the judge

judge had not certified, that the right to the land came in question, the plaintiff ought not to have more costs than damages, the damages being under 40s. For perhaps the defendant declined at the trial to insist upon a right to build the wall, &c. But as to this Mr. justice *Fortescue* and Mr. justice *Probyn* gave no opinion. But then all the judges agreed, the plaintiff ought to have full costs as to the issue on the *extra viam*, upon the authority of that case in 2 *Lev.* 234. And full costs were ordered to be taxed accordingly for the plaintiff.

HIGGINS
v.
JENNINGS.

The King *vers.* Robert Reeks.

AN information in nature of a *quo warranto* was filed against the defendant, to shew by what authority he claimed and exercised the office of a burghess of the borough of *Christ-Church Twineham* in the county of *Southampton*, from 19 *Decem.* 1721. to the time of exhibiting the information. The defendant in his plea set out the constitution of the borough (which was by prescription) and that he was chose a burghess the 19th of *December* 1721. according to the constitution he had set out, and that he was sworn and admitted into the office. To this plea there was a replication, in which several issues were tendred and joined. The fourth issue was, that the defendant was not sworn nor admitted into the office of burghess, as in his plea he had alleged. The cause was tried at the bar the 7th of *November*, by a *Hampshire* jury. And all the issues being upon the defendant, he gave evidence to maintain the three first. But then in order to prove his being sworn and admitted the 19th of *December* 1721, he produced an instrument in parchment, purporting the swearing and admitting on that day five burghesses, of which the defendant was one, but not named the first in the said instrument, but the third, two others being named before him. It was proved to be signed by the burghesses then present; but it was stampt only with one stamp. Upon which Mr. attorney general for the king objected, that this is no proof of the swearing and admitting of the defendant (both which it was incumbent on him to prove) nor could be admitted to be read in evidence: for by the statute of 9 & 10 *W. 3. c. 25.* an act for granting further duties upon stampt vellum, parchment and paper; *sect.* 27. for every piece of vellum or parchment, and for every piece of paper, upon which any admission into any corporation, &c. shall be written, 1s. shall be paid. Then *sect.* 59. the commissioners are required to stamp, &c. And afterwards by that clause it is enacted, if any instrument or writing by that act intended to

S. C. 1 Str. 716.
How to authenticate an admission that is not stampt at the time.

If a statute directs that there shall be a certain stamp upon every piece of vellum, &c. upon which any admission into a corporation shall be ingrossed, &c. the admission of several persons cannot be ingrossed upon the same piece of vellum, &c. unless it has as many stamps as there are admissions S. C. Str. 716.

If the admission of several persons is ingrossed upon the same piece of vellum, &c. and it has been but one stamp, such stamp can only operate in favour of the person whose admission stands first. vide Dougl. 207.

If a statute provides that vellum, &c. to

be stampd shall not be ingrossed before it is stampd, and that if it is, it shall not be evidence until it shall be stampd, and a penalty paid, and a receipt produced; for it directs that every piece of vellum, &c. on which any admission into a corporation shall be ingrossed, &c. shall be stampd, an ingrossment of the admission made after the admission on vellum not stampd at the time of the admission is not to be received in evidence without a receipt for the penalty, S. C. 1 Barn. B. R. 3.

be

Rex
v.
Reeks.

be stampd, shall contrary to the intent thereof be written or ingrossed by any person whatsoever (not being a known clerk or officer, who in respect of any publick office or employment is or shall be intitled to the making, writing or ingrossing the same) upon parchment or paper not stampd according to that act, then there shall be paid to his majesty, &c. over and above the duty aforesaid, for every such instrument or writing, ten pounds; and that no such instrument or writing shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity, until as well the said duty as ten pounds should be paid to the king, &c. and a receipt produced for the same, &c. Mr. attorney general therefore insisted, that this instrument, being an admission of five persons to be burgesses, ought to have five stamps. That it could be good for none for the uncertainty, or at most it could be good but for one; but that could not be for the defendant, for if it was good for any, it must be for the first named; but the defendant was the third named, and therefore it could not be good for him. And of this opinion were *Raymond* chief justice, and *Fortescue* and *Reynolds* justices, after having heard what the counsel for the defendant could say. But then they offered in evidence four other distinct pieces of parchment, dated the same 19th of *December 1721.* each of them being duly stampd, which imported the several admissions and swearings of the four burgesses last named in the other parchment, and one of them the particular swearing and admission of the defendant. But then it was proved by the witness who produced these pieces of parchment, that the entries were not made upon them, nor were any of them stampd, till near two months after the 19th of *December 1721.* nor were any of them signed by the burgesses that elected and were to admit the defendant. But after having heard what was objected to this single instrument, wherein *Reeks* alone was said to be admitted and sworn by Mr. attorney general and the other counsel for the king, and what was insisted upon to support it by Mr. *Reeve* and the other counsel for the defendant, the same judges were clear of opinion, that this instrument was no evidence, nor could be admitted as such, to prove the defendant was admitted and sworn the 19th of *December 1721.* for it appears it was not entred upon, nor the parchment stampd, till two months after; and by the act the admission is to be on paper or parchment stampd at the time, otherwise it is not to be given in evidence, till the penalty is paid, and certificate thereof produced. Upon which they directed the jury as to this issue, to find for the king. But the judges acquainted the counsel for the defendant, if they insisted upon having a verdict upon the other issues for the defendant, the trial must proceed, and the evidence must be heard on those issues for the king, and then they

they must be left to the consideration of the jury, whether they would find for the king or the defendant, as to those issues. But then they put them in mind, if a verdict on these three issues should be found for the defendant, yet judgment of *ouster* must be given against the defendant, according to the case of the king against *Pindar*, in an information in nature of a *quo warranto*, for exercising the office of mayor of *Penryn*: he pleaded the constitution of the corporation, and that he was elected and sworn mayor, &c. and issue being taken in the replication, both as to his being elected and as to his swearing, upon the trial the jury found he was elected; but then they found upon the other issue, that he was not sworn; and thereupon judgment of *ouster* was given against him in this court, *Easter term 1724*, and on a writ of error brought on that judgment in the house of lords, that judgment was affirmed *March 22, 1725*. Upon consideration whereof the counsel for the defendant agreed, that by their consent the jury should find all the issues against the defendant: and so they did. Note, Mr. justice *Probyn* had not took his place in court, when this trial came on.

REX
v.
REXES.

William Gordon, clerk, *vers.* Robert Lowther, Esq; late governor of Barbadoes.

AT a committee of the council at the *Cockpit, Decemb. 14, 1726*, for hearing plantation causes, the defendant *Lowther's* petition for a dismissal of the plaintiff's writ of error came on, upon this case. Mr. *Gordon* brought an action for a libel against Mr. *Lowther* in *August 1722*, in the court of common pleas in *Barbadoes*, to which Mr. *Lowther* put in a special justification, and upon a demurrer judgment was given in that court for the defendant Mr. *Lowther*, in *September 1724*. Upon which judgment Mr. *Gordon* brought a writ returnable before the governor in the court of errors, and the 12th of *June 1725* the judgment was affirmed, and Mr. *Gordon* moved for an appeal, which was then granted, and received and filed; since which time Mr. *Gordon* never proceeded upon his appeal, nor procured the proceedings to be transmitted, but Mr. *Lowther* procured them all to be transmitted at his own expence, and applied to his majesty by petition, to dismiss the appeal. Which being referred to the committee, they being acquainted that the rule was, that the party appealing must procure the proceedings to be transmitted, and proceed, within a year after the appeal allowed in the plantations; and upon producing two precedents, wherein such dismissal had been ordered, without giving notice to the appellee; the lords and others of the committee agreed to report to his majesty their opinion, that the appeal of Mr. *Gordon*

An appeal from the plantations shall be dismissed with costs and without notice to the appellant or his agent, unless he procures the proceedings to be transmitted and goes on with the cause within a year after the allowance of the appeal in the plantations.

ought

GORDON
v.
LOWTHER.

ought to be dismissed with 5*l.* costs (following the precedents produced as to the costs) without any notice given to Mr. Gordon, or any agent of his. Note, among other lords, the lord privy seal, lord Trevor, and chief justice Raymond, the master of the rolls, and the lord chief justice Eyre, were present, and agreed to the order.

Magoons and Premanee *vers.* Dumaresque, *et c*
contra.

December 14, 1726.

The courts in the islands subject to the crown cannot transmit a cause to the king in council without giving any judgment in it.

AT the same committee of council there came on the petition of *Magoons* and *Premanee*, owners of the ship *L'Esprit*, and a petition of Mr. *Dumaresque*, officer of the customs in *Jersey*, and a letter from the *greffier* of *Jersey* to the clerks of the privy council; all which, by order of his majesty in council, were referred to this committee. And they arose upon this case. Mr. *Dumaresque* made a seizure of the ship and goods, as forfeited, for having imported into *Jersey* East-India goods, contrary to the act of parliament; and thereupon commenced a suit in the royal court there, for a condemnation of the ship. *Magoons* and *Premanee*, owners of the ship and goods, insisted there, that the ship was drove in by stress of weather. The court looking on it as a case of difficulty, without making any determination, ordered their *greffier* to send a letter to the clerk of the council, taking notice of the difficulty, and desiring his majesty would determine the matter here; which he did write, and transmitted all the proceedings hither. Upon which *Magoons* and *Premanee* petitioned for an order for the delivery of the ship and goods; and Mr. *Dumaresque* petitioned for an order, for the royal court of *Jersey* to proceed, and determine the seizure. And the lords and others of the committee being all of opinion that the court of *Jersey* could not transmit the cause to his majesty for difficulty, but ought to have determined the right of the seizure one way or other, agreed to report their opinions to his majesty, that an order should be made by his majesty in council, taking notice that the transmission was irregular, and commanding the royal court of *Jersey* to proceed to give judgment.

Dyke and others *vers.* Blakston.Intr. Mich. 13
Geo. B. R. Rot.

ERROR on a judgment in the common pleas in an *indebitatus assumpsit* by *nil dicit*, and a writ of inquiry executed, and final judgment given for the defendant *Blakston*, who was plaintiff in the common pleas. Mr. *Parker* for the plaintiff took exception. The record is, that the defendants below *veniunt et nil dicunt in barram, &c.* but it is not said, they appeared by attorney, as it ought to be; and the law is so strict as to that, that the omission of the *Christian* name of the attorney is error. 1 *Roll. Rep.* 336. *Hewson's* case; nor is it said, the defendants appeared in *propriis personis*. *Sed non allocatur*; for when it is said, *veniunt*, that imports in proper person, if it is not said it was by attorney. The second error assigned was, that the writ of inquiry was returnable *quindena Paschae*, and the inquisition was returned to be taken the 25th of *April*, which was *quindena Paschae*, and therefore ill; because the law making no fractions of the day, the inquisition could not be took on the day of the return of the writ. *Sed non allocatur*; for the court will take it, that the inquisition was took on that day before the writ was returned, which is well enough, for it may be executed on that day, and might have been executed before the writ was returned, otherwise the inquisition could not have been returned. Judgment was affirmed *November* 12, 1726.

No objection can be taken to a judgment because it is not stated whether the defendant appeared in person or by attorney.

A writ may be executed on the return day. R. acc. Burr. 812. 2 Will. 372.

Walter White *vers.* William Clever.

S. C. Fort. 333. 1 Barnard. B. R. 4.

Intr. Trin. 12
Geo. B. R.

IN debt on a bond dated 27th of *June*, 10 *Geo.* of the penalty of 100*l.* the defendant prayer *oyer* of the bond, and the condition; which condition, reciting that the defendant and plaintiff were lately chose collectors for the overseers of the poor of *St. Andrew Holborn* for the year ensuing, according to the custom of the parish, and that the said *Walter White* could not conveniently attend and serve the said office by reason of business, was, that if the said *William Clever* should collect all such monies as should be to be collected by virtue of the said office, and should carefully execute the said office singly, without trouble to or assistance from the said *Walter White*, and do other things

A rejoinder excusing the non-performance of a condition is a departure from a plea insisting upon performance. R. acc. ante 233. Com. 553. 1 Saund. 126. 1 Mod. 43. 2 Keb. 612, 619. & vide ante 1256. 1 Will. 334. Str. 422. 7 Vin. 538.

Upon a bond conditioned to execute an office singly, without the plaintiff's aid, if the defendant pleads that he did execute it singly, he cannot rejoin that the plaintiff for a time prevented him from executing it singly.

mentioned

WHITE
v.
CLEVEL.

mentioned in the condition, not material to the present case to be mentioned, the obligation was to be void, else to be in full force. Then the defendant pleaded, that he did diligently exercise the said office singly, without trouble to or assistance from the said *Walter White*, and then pleads performance of the rest of the condition. The plaintiff replies, that the defendant *non executus fuit dictum officium singulus, Anglice singly, sine auxilio de dicto Waltero White, prout praedictus Willielmus superius placitando allegavit; et hoc petit quod inquiretur per patriam.* The defendant rejoins, *protestando* that the plaintiff kept the defendant's books out of his custody without his consent from the 22d of April 1725, to the 24th of June next following, *et libros illos semper abinde detinuit, custodivit, et illos eidem Willielmo deliberare denegavit, per quod* the defendant after the detaining of those books out of his custody, the money, &c. singly could not collect; for plea saith, *quod verum est* that the plaintiff in propria persona sua exercuit officium praedictum a praedicto 22 die Aprilis anno supradicto usque praedictum 24 diem Junii, sed quod praedictus the plaintiff voluntarie suscepit et officium praedictum a toto tempore praedicto exercuit sine requisitione vel consensu praedicti the defendant, qui per totum tempus praedictum semper paratus fuit et obtulit the plaintiff apud Londinum praedictum in parochia et warda praedictis dictum officium ad exercendum singulus, Anglice singly, sine auxilio praedicti the plaintiff; et hoc idem the defendant paratus est verificare, &c. The plaintiff demurred specially, and shewed for cause that the rejoinder was a departure from the bar; the defendant joined in demurrer. And after hearing what Mr. serjeant Girdler could say in behalf of the defendant, the court was clear of opinion, that the rejoinder was naught; for if the fact there disclosed amounted to shew, that the defendant had executed the office singly, the defendant ought to have joined issue with the plaintiff upon the issue offered by him in his replication, and given this matter in evidence: but if the fact set out in the rejoinder was only an excuse for the defendant's not having exercised the office, as the court took it to be; then it was a departure from the bar; and the defendant ought not to have pleaded, that he did execute the office singly, and rejoin this matter; but ought to have pleaded this matter at first. Judgment for the plaintiff, November 3, 1726.

Intr. Trin. 28
Geo. B. R. Rot.
91.

Q. Whether an
indebitatus as-
sumpsit for
divers goods
merchandises
and things is not

Robert Spark *vers.* Thomas Jobber.

IN an *indebitatus assumpsit* for 100 l. *pro diversis bonis mer-
imoniis merchandizis et rebus* by the plaintiff at the request
of the defendant sold to the defendant, &c. and a quantum

and things is not too uncertain.

SPARK
vs.
JOHNS.

laid in the same manner, the defendant demurred to the declaration, and the plaintiff joined in demurrer. The cause coming on in the paper the 9th of *November*, no counsel appeared for the defendant. Whereupon the counsel for the plaintiff prayed judgment, alleging it was only a demurrer for delay. But the court objected, that the word *rebus* was a very uncertain word, for it might be for rent, or money due on a bond, &c. for which an *indebitatus assumpsit* would not lie. But the counsel for the plaintiff informing the court, that the defendant declared he would not defend it, judgment was given for the plaintiff. Note, this was only an interlocutory judgment on the demurrer.

Lancaster *vers.* Fielder.

IN an action brought by the plaintiff *L.* against the defendant, the defendant put in bail, and afterwards was surrendered in discharge of his bail, and committed to the *Marshalsea*; the plaintiff proceeded in the action, and got judgment, and sued execution thereon by *elegit*, upon which the sheriff took an inquisition, and levied some of the goods of the defendant in part of the debt, but returned, the defendant had no lands. Mr. serjeant *Whitaker* moved, that the defendant might be discharged out of custody: for since the defendant has chose an *elegit*, he can have no other execution, because he has made election, to take the *elegit* according to the statute of *Westminster* 2. 13 Ed. 1. st. 1. c. 18. 2 *Inst.* 395. *Coke* says, after suing out an *elegit*, the plaintiff upon a judgment in debt cannot have a *capias*. Upon which the court made a rule, for the plaintiff to shew cause, &c. And at another day the judges were all of opinion, that it being returned, that the defendant had no lands, the *elegit* was to be considered only as a *fieri facias*, though goods were levied; and that if the defendant had been at large, the plaintiff might have had a *capias ad satisfaciendum*. So is *Hobart's* opinion, *Hob.* 58. *Foster v. Jackson.* 1 *Lev.* 92. *Glascock v. Morgan.* But if any land had been extended on the *elegit*, the plaintiff had been bound down to that execution. The former rule was discharged *November* 25, 1726.

Tho' a plaintiff takes out an *elegit* upon a judgment, and levies goods thereon, yet if the sheriff return that the defendant had no lands, and the goods levied were insufficient to discharge the whole debt, the plaintiff may proceed against the person of the defendant for the residue. R. acc. *Str.* 226.

The King *vers.* Fawle.

November 23, 1726.

An indictment for a felony shall be removed from a corporation sessions, if there is reason to apprehend the defendant cannot have a fair trial there.

MR. Fazakerley moved for a *certiorari*, to remove an indictment found against the defendant, for a felony in stealing some hay, from the quarter-sessions of the peace held for the town and corporation of *Chippington Norton*, upon *affidavits* that the defendant could not have a fair trial there. And he cited a case between the King and *Powell*, where a *certiorari* was granted, to remove an indictment from the quarter-sessions of the peace for *Salop*, for the like reason. And a rule was made, for the prosecutor to shew cause; which was afterwards made absolute.

Parry *vers.* Berry.

November 13, 1726.

S. C. Str. 717.

Proceedings against the bail to an action shall not be stayed on account of the death of the principal, if he was alive at the return of the *capias ad satisfaciendum*.
R. acc. Str. 511.
Semb. 2 Will.
67. vide Burr.
244. 436. Bl.
811.

MR. *Theed* moved to stay proceedings upon a *scire facit* against the bail, because the defendant in the original action died after judgment recovered against him, and after a *capias ad satisfaciendum* thereupon sued out and returned, but before the return of the second *scire facit* against the bail, till which time the bail had time by the course of the court to surrender the principal, and was prevented doing it by the act of God, *viz.* his death. And a rule was made to shew cause. But afterwards upon Mr. *Parker's* shewing cause, the rule was discharged, because it was the bail's omission, that they did not surrender him, he living till after the return of the *capias ad satisfaciendum*. And a motion made in behalf of the bail, *Mich. 1 Geo. 2. B. R.* between *Glynn* and *Tates*, Str. 511. in the like case, was for the same reason denied.

Barber and Philpot *vers.* Wharton.

S. C. but differently reported 1 Barnard. B. R. 2.

A prohibition shall not be granted after sentence to a suit in the admiralty upon a contract because the contract does not appear to have been made within the jurisdiction of the admiralty, if it stated to have been made *infra fluxum & refluxum maris, infra jurisdictionem* & *maritima*.

A Rule was made last term, to shew cause why prohibition should not be granted to the court of admiralty to stay a suit by the defendant as master of the ship *Victory* for his wages, upon a suggestion that the contract was made upon land, &c. according to the case of *Clay v. Snelgram*, Trin. 12 Will. 3. B. R. 1700. [See before 576.] Shortly reported in *Salk.* 33. where it was held, a master of a ship could not sue in the admiralty for his wages, where the

BARBER
v.
WHARTON.

contract was made upon land, though mariners were permitted so to do, by indulgence rather than of strict right. And Mr. Reeve for the defendant shewed for cause why the rule for the prohibition should not be made absolute, that the application to this court was too late, for it was after sentence; and then it was insisted upon, no (a) prohibition should go, unless it appeared upon the face of the libel, that the admiralty had no jurisdiction, which it did not in this case. Upon which the cause was put off this term; and now the 27th of October Mr. Fazakerley for the prohibition insisted, that though it was after sentence, yet if it did not appear upon the face of the libel, that the admiralty had a jurisdiction, a prohibition ought to go. It cannot be within their jurisdiction, unless the contract was laid to be *super altum mare*, which is not done in this case, for it is only laid to be *infra fluxum et refluxum maris, infra jurisdictionem curiae admiralitatis*. In *Hob. 212.* it is held, that it is not enough to give the admiralty jurisdiction, that a fact was done *infra jurisdictionem maritimam*, therefore the laying the contract to be made *infra jurisdictionem admiralitatis* is not sufficient: then laying it to be *infra fluxum et refluxum maris* is not enough, because at low-water that is within the jurisdiction of the common law. And it cannot be made good by intendment, for in *1 Vent. 308.* the taking not being expressly laid to be *super altum mare*, though the book says, there was much to imply it; yet the court held it not sufficient, for the alleging it was absolutely necessary. *Sed non allocatur*; for the court was of opinion, that the contract being laid, to be made *infra fluxum et refluxum maris*, it might be upon the high sea; and was so; if the water was at high-water mark; as it might be on land, if the water was at low-water mark; for in that case there is *divisum imperium* between the common law and admiralty jurisdiction, according as the water was high or low. Then when it is said to be *infra jurisdictionem admiralitatis*, it is sufficient, and amounts to the same, as if it had been said to be *super altum mare*. But if it had appeared upon the libel, that the contract was made upon the land, the adding *infra jurisdictionem admiralitatis*, or *infra jurisdictionem maritimam*, could not have been enough, to intitle the admiralty to a jurisdiction. And therefore the rule for the prohibition was discharged. See *1 Roll. Abr. 532. pl. 12.* where it is held to be sufficient, to allege that the contract was made *infra jurisdictionem admiralitatis*, without saying it was made *super altum mare*; for if it was not made on the high sea, it ought to be suggested on the other side, to have a prohibition.

(a) D. acc. 3
T. R. 5 Dougl.
363. arg. ante
272. vide Com.
Prohibition. D.
2d. Ed. vol. 4.
p. 490.

The King *vers.* Benoier.

S. C. (a) 2 Seff. Caf. 56, pl. 58.

A father in law is not bound to maintain his children in law. vide Burn. Poor Rate. lii. in the observations upon the words father—grandfather and grandmother—and children. Nor a child in law his parent in law.

MR *Verney* moved, to quash an order made at the quarter-sessions at *Hersford*, whereby the father in law was ordered to maintain his daughter in law; because he was not by law obliged to maintain her. And he cited the *King v. Mundy*, *Str.* 190, *Sett. and Rem.* 93. pl. 123. *Fort.* 303. *Trin.* 5 *Geo.* an order made by the justices upon a son in law, to maintain his mother in law, was quashed. And a rule was made to shew cause, why it should not be quashed; which rule was made absolute, no person shewing cause to the contrary, *Hil.* 13 *Geo. B. R.* January 31, 1726.

(a) According to the report in 2 Seff. Caf. several exceptions were taken to the order, and upon that report it does not appear on which of them the order was quashed.

Hilary Term

13 Georgii regis, B. R. 1726.

William Gregson *vers.* John Heather.Intr. Mich. 13
Geo. B. R.

S. C. Str. 727. Fort. 366.

THE plaintiff brought an action of debt upon a bail-bond for 130*l.* as assignee of *William Nicholls, Esq;* late sheriff of the county of *Surrey*, and laid it in *London*, and set out, that the defendant 7th *January 1724.* at *Streatham* in *Surrey*, was arrested by the said sheriff upon an attachment of privilege at the suit of the plaintiff, &c. and that the sheriff took bail for his appearance, and the defendant then and there became bound to the sheriff in this bond, &c. with condition, that he should appear, &c. but he did not appear, &c. whereby the bond became forfeited; and that the said *William Nicholls* afterwards, viz. 22d *December 1725.* at *London*, viz. in the parish of *St. Mary le Bow* in the ward of *Cheape*, at the request of the plaintiff assigned to the plaintiff the said bond, according to the statute, &c. The defendant demurred generally, and the plaintiff joined in demurrer. And the exception *Mr. Fazakerley* took to the declaration in behalf of the defendant was, that the sheriff could arrest only within his county, and take the bail-bond only there, which was in *Surrey*; and therefore the assignment being transitory matter, and not local, ought to have been laid at *Streatham* in *Surrey*, where the bond was taken, and not in *London*. But the court was unanimous of opinion, the plaintiff might lay the assignment in *London*, if he pleased. And therefore gave judgment for the plaintiff, *January 27. 1726.*

In an action on a bail bond by the sheriff's assignee, the assignment may be stated to have been made out of the county in which the arrest was made and the bond taken. R. acc. *Norcroft v. Matthews.* Tr. 13 G.

In such case the venue may be laid in the county in which the assignment is stated to have been made. R. acc. *Norcroft v. Matthews.* Tr. 13 G. vide *Say.* 54. 2 T. R. 241, 277.

Intr. Mich. 13
Geo. B. R. Rot.
and intr. Easter
term 11 Geo.
C. B. Rot. 396.

David Chefman and Elizabeth his wife *vers.*
Margery Nainby.

S. C. with the arguments of the counsel more at large Str. 739.

If the consideration of a bond appears by the condition to be that the obligee should take the obligor apprentice, and the condition recites that he had consented so to do, the obligor cannot object in avoidance of the bond that the obligee was not compellable to take him.

Particularly after he has taken him, and kept him the time agreed upon.

A contract to restrain a man from ever exercising a trade any where, is bad. D. acc. arg. ante 1131. vide 1 P. Wms. 181. 10 Mod. 27. 85. 130. Fort. 296.

A contract to restrain him from exercising it in a particular place, good.

S. C. Fort. 297. R. acc. Ann. 53. 1 P. Wms. 181. 10 Mod. 27. 85. 130. Fort. 296.

D. acc. arg. ante 1131. sed vide 3 Lev. 241. see also Bro. & C. 419. If the condition of a bond is that a man shall not do either of two things, tho' it is void by the common law as to one, it may be good as to the other. S. C. Fort. 297. Acc. Str. 1138. vide Co. Litt. 206. b. 13th Ed. a. 1.

ERROR upon a judgment given in debt against the plaintiffs in error upon bond for the defendant in error and plaintiff below; wherein *Nainby* the plaintiff below declared upon a bond entered into by *Elizabeth* the wife of the plaintiff in error, *dum sola*, by the name of *Elizabeth Vicars*, dated the 5th of *October* 8 *Geo.* to the said *Nainby* in 100*l.* The defendants in the common pleas, *Chefman* and his wife, prayed *oyer* of the bond, and of the condition, which was thus: Whereas the above named *Margery Nainby*, at the special request of the abovebound *Elizabeth Vicars*, is to take her the said *Elizabeth Vicars* for her hired servant, to attend in her shop, and to inspect her customers there, and to shew her goods, and further to stand by and assist her the said *Margery* in her said trade and business of a linen-draper; whereby it is presumed the said *Elizabeth*, if she continues any length of time in the said service of the said *Margery*, may become a perfect and knowing person in the said trade; and whereas the said *M. N.* consents to hire and take her the said *E. V.* upon and in consideration only upon the express promise and agreement of the said *Eliz.* that she shall not nor will at any time after she shall have left the service of the said *Margery* set up or exercise the said trade of a linen-draper, either by herself or any other person in trust for her directly or indirectly, in any shop, room or place, within the space of half a mile of the now dwelling-house of the said *M. N.* in *Drury-Lane*, or in any other house that she the said *M. N.* her executors or administrators, shall think proper to remove to, in order to carry on the said trade of a linen-draper, nor shall the said *Eliz.* within the same space of half a mile, directly or indirectly be concerned in or assist or instruct any other person in the managing and carrying on the said trade, under colour or pretence of being a servant to such person, or under any other colour or pretence whatsoever; which said promise and agreement, joined with the good character and opinion she the said *M. N.* hath of the integrity and honesty of her the said *Eliz.* is the sole consideration that hath obliged the said *M. N.* to take the said *Eliz.* into her service for 3 years: now the condition of the above obligation is such, that if the said *Eliz. Vicars* shall act contrary to and in breach of the above recited promise and agree-

ment, according to the true intent and meaning thereof, or of any part thereof, that then and in such case the said *Eliz. Vicars*, her executors and administrators, shall thereupon pay or cause to be paid to the said *M. N.* her executors, administrators and assigns, the sum of 100*l.* the said 100*l.* being the consideration money the said *M. N.* might reasonably expect with an apprentice to the said trade; that then this obligation to be void, otherwise to remain in full force. After oyer of which said bond and condition the defendants pleaded in bar, that the said *Eliz.* from the making of the said bond did continue and remain in the service aforesaid until the 28th day of April 1724. and then left that service, and that the said *Margery* continued to inhabit and reside and exercise her said trade in her said mansion-house in the said street vocate *Drury-lane* from the time of making the said bond till the time of suing out her original writ; and that the said *Eliz.* within half a mile of the said mansion-house of the said *Margery* at any time after the departure of the said *Eliz.* out of the service of the said *Margery* directly or indirectly was not concerned in or had instructed or assisted any other person in managing or exercising the said trade, under colour or pretence of being servant to such person, or under any other colour or pretence whatsoever; and the defendants further plead, that the said *Eliz.* at any time after the departure of the said *Eliz.* out of the said service of the said *Margery* did not use or exercise the said trade either by herself or by any other person in trust for her directly or indirectly in any shop, room or place within half a mile from the said mansion-house of the said *M. N. &c.* The plaintiff below replied, that the said *Eliz.* from the time of making the said bond did continue and remain in the said service, and out of the said service did depart, as the defendants above alleged; and that the said *Margery* continued to inhabit, reside and exercise her trade, as the defendants above alleged; but the said *Margery* further said, that the said *Eliz.* within the space of half a mile from the said mansion-house of the said *Margery* above-mentioned, and within nine months next after the departure of the said *Eliz.* out of the said service, did assist and instruct a certain person, viz. the said *David Chelman* in *advizando et exercendo misterium praedictum* in the condition above-mentioned, contrary to the tenor of the said condition, viz. in the said street called *Drury-lane, &c. et hoc petit quod inquiratur per patriam*; upon which issue was joined. And upon a trial at nisi prius in *Middlesex*, before lord chief justice *King*, a verdict was found for the plaintiff, and judgment given for her by the court of common pleas. Upon which judgment this writ of error was brought.

Mr. *Strange* for the plaintiffs in error agreed, that a bond given for a valuable consideration, to restrain the exercise of a trade in a particular place, would be good; and therefore he said he would not dispute the resolutions in the cases of *Mitchell v. Reynolds*, 1 P. Wms. 181. 10 Mod. 27. 85. 130. Fort. 296. adjudged Hil. 11 Ann. B. R. and of *Bowers and Wrench*, adjudged the same term. But he insisted, here did not appear in the condition of this bond to be any consideration; because it does not appear by the condition, that *M. N.* was compellable to take *E. V.* into her service. *Margery Nainby's* taking *Eliz. Vicars* is the meritorious consideration of the bond; but that was executory, at the time when the bond was made; and therefore if there was no power in *E. V.* to compel *M. N.* to take her, as there does not any appear, that cannot be called a consideration, since *M. N.* might refuse it; and for this he cited *Yelv. 49. Allan v. Randall*, that where the condition was executory, the plaintiff to intitle himself to an action upon the promise against the defendant, ought to shew, he had performed, or was under legal obligation to perform it. And although by the plea the defendants plead, that the said *Eliz.* from the making of the said bond, which was the 5th of October 1722. did continue in the said service till the 28th of April 1724. and then left that service; yet the court ought not to regard that allegation, but the judgment of the court, whether the bond was good, ought to be founded upon what appears in the bond itself. *Sed non allocatur.* For *per curiam*, it appears plainly, that *Margery Nainby* had agreed to take *E. V.* into her service; for in the condition of the bond it is said, *M. N.* is to take *E. V.* into her service, &c. which imports an agreement by *M. N.* so to do; and it is further said in the condition, *M. N.* consents to take the said *E. V.* and in another place it is recited in the condition, that the said *E. V.*'s promise and agreement, &c. is the sole consideration that hath obliged *M. N.* to take the said *E. V.* into her service, &c. all which expressions import an agreement between *M. N.* and *E. V.* that *M. N.* should take *E. V.* into her service, in consideration that *E. V.* had agreed not to trade, &c. And this being in the condition of the bond sealed by the said *E. V.* appears to have been so under her hand. Besides, the plea confesses *M. N.* did take her into her service, and that *E. V.* departed from it; and therefore all the court held the bond, notwithstanding this objection, was a good bond. And if *M. N.* had refused to take *E. V.* into her service, &c. *E. V.* ought to have pleaded it; instead of which the defendants have shewed by their plea, that *E. V.* was admitted into *M. N.*'s service, &c. Then Mr. *Strange* insisted further, this bond was void, because the restraint of trade was not confined to a particular place, but was in effect general; because the condition is not only that *E. V.* should

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should not exercise the trade, &c. within half a mile of the then dwelling-house of *M. N.* in *Drury-lane*, but it is also of any other house that *M. N.* her executors or administrators, shall think fit to remove to, to carry on the said trade; which may be extended all *England* over; for if *E. V.* sets up in the remotest part of the kingdom, if *M. N.* her executors or administrators, removes within half a mile of that place, *E. V.* must not exercise her trade, &c. there; and so *toties quoties*: so that by that means the bond will be a general restraint every where: whereas these sort of bonds are not good, unless the exercise of the trade is only restrained in a particular place. But to this serjeant *Whitaker* answered for the defendant in error, that if a bond is given, with condition to do several things, and some are agreeable to law, and some against the common law; the bond shall be good as to the doing the things agreeable to law, and only void as to those that are against the law. But if a bond is given, with condition to do a thing against an act of parliament, and also to pay a just debt; the whole bond will be void; because the letter of the statute makes it void, and is a strict law. So is *Hob. 14 Norton v. Sims. 14 H. 8. 15. 3 Co. 88. 1 Ventr. 237.* Now the breach is assigned upon part of the condition, which is good in law; and therefore if the other part, to which *Mr. Strange* takes the exception, should be against law, yet that will not hinder the plaintiff's recovery upon this part of the condition, which is legal. And of that opinion was the whole court. And judgment was affirmed, *Friday February 3, 1726.* After this, error was brought in parliament, and *February 22, 1727.* by the unanimous opinion of all the then twelve judges this judgment was affirmed with 40*l.* costs. 3 *Bre. Parl. Cas.* 349.

Gabriel Johnson *vers.* James Laferre.

S. C. Str. 745.

ERROR upon a judgment in a *scire facias* sued in the common pleas by *Laferre* upon a recognizance for 440*l.* entred into by *Johnson* to *Laferre*, in which judgment was given for *Laferre*. *Johnson* the defendant in the common pleas prayed there *oyer* of the recognizance, and the condition, which condition recited, that *Hugh Howard* and *Thomasine* his wife, executors of *John Langston*, esq. had sued a writ of error returnable in the king's bench, upon a judgment recovered in the common pleas by *Laferre* against *Howard* and his wife; if therefore the said *Howard* and his wife prosecuted the writ of error with effect, &c. and paid the sum recovered, and also the damages and costs that should be awarded if the judgment should be affirmed, &c. that then, &c. after which *oyer* had, the said *Johnson* pleaded in

Intr. Hil. 13 G.
B. R. and Trin.
12 G. C. B.
Rot. 1326.

Bail in error are bound by their recognizance, tho' the plaintiff in error had no occasion to put in bail.

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in bar of the *scire facias* the act of 16 & 17 Car. 2. c. 8. to prevent arrests of judgment and superseding executions, and the *proviso* therein, that that act should not extend to any writ of error to be brought by an executor, &c. *per quod* the said recognizance taken contrary to the said statute *vacua in lege existit*. And upon demurrer judgment was for the plaintiff *Laserre* in the common pleas. And Mr. *Strange* for the plaintiff in error insisted, that executors by the act of Car. 2. were not obliged to enter into recognizances upon writs of error brought by them upon judgments obtained against them, and that this appearing to be such a recognizance, was void. But *per totam curiam*, if a man will voluntarily enter into such a recognizance, 'tis good at common law. And judgment was affirmed. Thursday February the 9th, 1726.

Intr. Trin.
12 Geo. B. R.
Rot. 467.

In an action by bill a plea which prays judgment of the declaration and that the same may be quashed, is to be considered as a plea in bar.

R. acc. ante 1205. vide 3 Bl. Com. 303.

Moffat v. Van Milling in B. R. H. 27 G. 3. ante 593.

In an action upon a bond the defendant cannot plead in bar that there was another obligor, who is still alive. Such matter can only be pleaded in abatement.

Semb. acc. 5 Co. 119. a. Cowp. 832. vide Burr. 2674.—See also Burr. 2611. Bl. 947.

If two enter into a bond and acknowledge themselves to be bound to the obligee in the penalty, and ad solutionem obligant: se et utrumque eorum per se pro toto et in solido, hæredes executores et administratores suos. Q. Whether the bond can be considered as the several bond of each. Vide Com. Obligation. F. C. 21. vol. 4. p. 281, 282.

Watts and his wife *vers.* Goodman.

IN debt upon bond dated the 30th of December 1707 for 100*l.* entred into by the defendant to Samuel Rutter former husband of the plaintiff's now wife, to whom she was administratrix; the defendant prayed *oyer* of the bond, which being entred in *haec verba*, it was; *Noverint universi per praesentes*, that the defendant and Benjamin Faulkner were bound to the said Samuel Rutter in 100*l.* to be paid to the said Samuel Rutter, *ad quam quidem solutionem bene et fiducialiter faciendam obligamus nos et utrumque nostrum per se pro toto et in solido hæredes executores et administratores nostros*, &c. *quæ lecto et audito*, the defendant *petit judicium de narratione praedicta*, because she says, that the said Benjamin Faulkner *signavit et deliberavit* the said bond as his act and deed to the said Samuel Rutter, and became jointly bound with the defendant to the said Samuel Rutter, and is yet alive, *viz. 24 &c. unde, &c. petit judicium de narratione praedicta et quod narratio illa cassetur, &c.* To which the plaintiff demurred, and the defendant joined in demurrer. This cause coming on in the paper the 26th of January; it was objected for the defendant, that the bond was a joint bond, there being no words in it, to make it several; and therefore the plaintiff had brought their action wrong, in suing the defendant alone. But Mr. *Robinson* for the plaintiff argued, that the bond was joint and several, and cited *Dier* 310. pl. 8. where an obligation was made by three, and the words were, *obligamus nos et utrumque nostrum per se pro toto et in solido*, and only two were sued, and they pleaded a special *non est factum*, after *oyer* of the condition of the bond; but there was no *oyer* of the bond itself, and the issue was found against the defendants; and it was moved in arrest of judgment, *l.*

Q. Whether the bond can be considered as the several bond of each. Vide Com. Obligation. F. C. 21. vol. 4. p. 281, 282.

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the plaintiff had judgment. 2 *Bull.* 70. *Cro. Jac.* 322. *Hankinson v. Sandilau.* Two bound themselves, or any of them, their heirs, executors, or either of their heirs, &c. this bond was held joint and several. And 1 *Lutw.* 697. *Sayer v. Chayter*, in debt on bond, on *oyer* it appeared, that the defendant *Chayter* and two others were bound, *ad quam quidem solutionem bene et fideliter faciendam obligo me, haeredes, executores et administratores meos*, and *Powell* justice was of opinion, the bond was joint and several, by reason of the words *obligo me, haeredes, &c. meos*, which is the same as if it had been said by the three obligors severally; and that the heirs were not obliged, before the words, *ad quam quidem solutionem*: and certainly it was the intent of the parties, the heirs should be obliged: yet if by those words the bond is not several, the heirs are not obliged. The same intent may be collected in this case. The cause was ordered to stand in the paper, to consider of the cases. And the judges all seemed strong in opinion, this could not be a several bond. But they gave judgment for the plaintiff, because this matter was pleaded in bar; whereas it is only a plea in abatement; for a plea which begins with a *petit judicium de narratione*, and concludes, *quod narratio cassatur*, is a plea in bar in the king's bench, and has been so often adjudged. Judgment for the plaintiffs, February 9, 1762.

The King *vers.* John Ward, Esq.

The Attorney General, by order of the house of lords, filed the following information against the defendant.

Information post. vol. 3. p. 353.

Trin. 11 Geo.
regis.

Middlesex ss. Memorandum, quod *Phillippus Yorke miles attornatus domini regis generalis, qui pro eodem domino rege in hac parte sequitur, in propria persona sua*

The forging of any writing by which a person might be prejudiced, was pu-

ishable as a forgery at common law. *S. C. Str.* 747. 1 *Barnard. B. R.* 10. cont. 1 *Hawk.* 70. f. 11. sed vide 4 *Bl. Com.* 247. And this too, tho' nobody was in fact prejudiced by it. *S. C. Str.* 747. 1 *Barnard. B. R.* 10. R. acc. ante 737. Forgery is punishable, tho' the thing forged is never published. *S. C. Str.* 747. 1 *Barnard. B. R.* 10. R. acc. post. 1518. vide *Crown Secut. Assistant* 274. 280. 429. 432. 425. In a criminal information a participle applying to a person of the offender, in the same sentence with, and preceding the charge, shall be referred to the time when the offence is stated to have been committed, if it is not expressly referred to a particular time. *S. C. Str.* 747. 1 *Barnard. B. R.* 10. vide *Rex v. Whistler B. R.* 15 June, 1757. *Salk.* 377. pl. 22. A criminal information against a man for forging a receipt for goods was chargeable to deliver, need not state how he was bound to deliver them. *S. C. Str.* 747. *Barnard. B. R.* 10. The word *dolium* may signify a ten weight. *S. C. 1 Barnard. B. R.* 10. The word *contrafecit* forged. *S. C. 1 Barnard. B. R.* 10. If a criminal information contains several counts, some of which only are good, and the defendant is found guilty upon all, judgment shall be given against him upon those which are good. *S. C. 1 Barnard. B. R.* 10. D. acc. *Regl.* 703. The defendant in a criminal information cannot object to the record because it does not state that proclamation was made if any body would inform the king's justices, &c.

venit

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venit hic in curia dicti domini regis coram ipso rege apud Westmonasterium die Mercurii proximo post tres septimanas sanctae Trinitatis isto eodem termino, et pro eodem domino rege dat curiae hic intelligi et informari, quod Johannes Ward de Hackney in comitatu Middlesexiae armiger existens onerabilis ad deliberandum trecenta et quindecim dolia, Anglice tons, et quarter unius doli alumini valoris quinque mille librarum praenobili Edmundo duci de comitatu Buckingham et de Normanby ad certum diem jam praeteritum, ipse idem Johannes Ward nequiter machinans et intendens praedictum ducem de praedicto alumine decipere et defraudare, et cum iniqua et fraudulenta intentione ad evitandum deliberationem ejusdem alumini, primo die Februarii anno regni domini Georgii Dei gratia Magnae Britanniae Franciae et Hiberniae regis, fidei defensoris &c. undecimo, apud Westmonasterium in comitatu Middlesexiae vi et armis, &c. in dorso cujusdam certificationis in scriptis, manu cujusdam Ambrosii Newton signatae, falso fabricavit et contrafecit et fabricari et contraferi causavit quoddam scriptum in verbis et figuris sequentibus, videlicet,

Tons	C.	Mr. John Ward, I do hereby order
660	5	you to charge the quantity of
315	5	hundred and sixty tons and one
		quarter of allum to my account
975	10	part of the quantity here mentioned

in this certificate, and out of the money arising by the sale of the allum in your hand pay to Mr. W. Ward and yourself ten pounds for every ton according to agreement, and for your so doing this shall be your discharge. Buckingham, April 30, 1706.

in malum exemplum omnium aliorum in hujusmodi casu delinquentium, ad grave damnum praefati ducis, ac contra pacem dicti domini regis nunc coronam et dignitatem suas, &c. Et idem attornatus domini regis generalis pro eodem domino rege ulterius dat curiae hic intelligi et informari, quod praedictus Johannes Ward existens onerabilis ad deliberandum trecenta et quindecim dolia, Anglice tons, et quarter unius doli alumini valoris quinque mille librarum praefato duci ad certum diem jam praeteritum, ipse idem Johannes Ward, nequiter machinans et intendens praefatum ducem de praedicto alumine decipere et defraudare, et cum iniqua et fraudulenta intentione ad evitandum deliberationem ejusdem alumini, postea, scilicet dicto primo die Februarii anno regni dicti domini regis nunc undecimo supra dicta, apud Westmonasterium in comitatu Middlesexiae, vi et armis, &c. quoddam scriptum falso fabricatum et contrafactum in dorso cujusdam certificationis in scriptis, manu cujusdam Ambrosii Newton signatae, nequiter, illicite et fraudulenter publicari et publicari causavit, quod quidem scriptum falso fabricatum et contrafactum sequitur in his verbis et figuris sequentibus, videlicet, [and then it is set out again] dicta Johanne

Ward adtunc et ibidem bene sciente dictum scriptum, per ipsum *Johannem Ward* ut praefertur publicatum, falsum et contrafactum fuisse; ad grave damnum praefecti ducis, &c. To this information the defendant pleaded not guilty, and upon May 2, 1725, upon a trial at bar by a special jury of gentlemen of the county of *Middlesex*, the defendant was found guilty; after which the defendant as it was said, went beyond sea, or at least absconded, so that proceedings were against him for outlawry, but he surrendered himself the last day in last term in court, which day the *exigent* was returnable, and was committed to the custody of the marshal, and Saturday the 4th of February he was brought by rule into court, to receive judgment. At which time Mr. *Hungerford*, Mr. *Ketelby*, Mr. *Bootle*, Mr. *Filmer*, and Mr. *Strange*, the defendant's counsel, moved in arrest of judgment. Whose arguments taking up that day, the counsel for the king, Mr. attorney-general *Yorke*, Mr. *Lee* one of his majesty's counsel, Mr. *Marsh*, Mr. *Fazakerley*, and Mr. *Verney*, answered the objections of the defendant's counsel upon Monday February 6; and upon the pressing instances of the defendant's counsel, they had time given them for their reply till next day.

The first objection that was made to the information by the counsel for the defendant was, that the offence laid was falsely making and forging a writing upon the back of a certificate in writing, signed by one *Ambrose Newton*, and this was no forgery at common law, and that the information being grounded upon the common law, and not upon the 5 E. c. 14. the information was not maintainable.

They insisted that forgery at common law must be of a record, or something of a public nature, as a privy seal, a licence from the barons of the exchequer to compound a debt, or a deed under seal, *Britt. 16. Fleta, c. 22.* but that counterfeiting other writings, of a private nature between party and party is no forgery at common law. 1 *Hawk. 184.* and therefore to say *A.* has forged a writing, is not actionable. 1 *Sider. 16.* In the case of *Cassubilly v. Brit.* So 1 *Roll. R. 431.* 1 *Rel. Ab. 66. pl. 8.* *Air v. Forst:* Thou hast made forged writings, and thou shouldst have lost thy ears for it, held not actionable, because it is uncertain what writings, and they might be such, the forging of which might not deserve the loss of ears. So *Cro. Eliz. 166. Hil. 32 Eliz. B. R. Vennor v. Wootton.* You have forged your father's hand, and thereby falsely have procured your father's tenants to pay their rents to you due to your sister: adjudged not actionable, because it is not shewn what things he forged for which he is by any law punishable; for it might be a letter, for which he is not punishable; and for that a case between *Brook and Daught,* 28 *Eliz.* was cited; you have forged my lord of *Leicester's* hand to such a letter, adjudged not actionable; and what *Croke* is reported to have said in *Wiltshire's* case, *Yelv. 146.*

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viz. that to say, *J. S.* has forged his father's hand, whereby he procured the tenants to pay him the rent due to his father, is not punishable, as (says that book) it was adjudged 3 *Eliz.* because it relates but to a private matter, for the son by no law is punishable for it. And this being before the statute of 5 *E.* it was urged was an authority in point, that such sort of forgery as this was not punishable at common law, viz. of an indorsement upon a certificate a thing merely of a private nature, and in effect nothing more than a letter. And this they say appeared by the *Stat. of 33 H. 8. c. 1.* which inflicts punishments on persons who get the money or goods of others into their hands under colour of a false token or counterfeit letter, for if such counterfeit letters had been at common law punishable as forgery, the making that statute was unnecessary and useless.

It was farther argued for the defendant, that a forgery is not punishable, unless it is to the prejudice of some person; therefore where *B.* was obliged in a bond of 100 *l.* for the honesty of his son apprentice to *A.* *A.* rases out *librii* in the bond, and puts in *marcias*; and adjudged this was not a forgery punishable, because it was not a prejudice to any body but to *A.* the bond being avoided by *A.* and the sum made less. *Noy 99. Black v. Allen.* So *Moor 655. pl. 897. Salway v. Walr.* (a) Antedating of a deed to defeat a mean assurance. But antedating is no forgery, unless there is a mean interest in a third person to be prejudiced thereby. Now in the present case it does not appear, that the duke of *Buckinghamshire* was prejudiced by this, for it is not alleged in the information, that the 315 tons of allum was prevented from being delivered thereby. If it had, they admitted an action would have laid against the defendant for a deceit, or he might have been indicted for a cheat, but not for forgery at common law.

On the other side it was argued by the counsel for the king, that notwithstanding these objections, the offence charged in this information was a forgery at common law, for which the defendant might have been indicted; and that the information was maintainable against the defendant for it. And of that opinion was the court unanimously. For the judges said, that although some of the forgeries at common law mentioned in the *Mirror, c. 4 & 5. Britt. 16 & Fleta, l. 1. c. 22,* which are cited in 3 *Inst. 169.* were capital, and as the law then stood punished with death; and others of them punished with lesser though infamous punishments; yet none of these books say, that the forgeries there particularly specified were the only forgeries punishable by the common law. It is not to be disputed, but that forging a deed was a forgery punishable by the common law; now forging a writing not sealed may be equally mischievous with forging a deed, and therefore as to the nature of the offence it falls under the same reason: and

(a) Vide 1
Hawk. c. 70. s.
2.

F. N. B. 96,
99, 100.

and *ubi eadem est ratio eadem est lex*. A forgery of a deed, though the prejudice arising therefrom may not be 40 s. is punishable as a forgery at common law. But the forging of a goldsmith's note, bills of exchange, &c. may be of vastly more mischievous consequence; and therefore it is reasonable, the offender should suffer the same punishment at least. It farther appears by the preamble of the statute 5 E. c. 14. that forging of writings was punishable at common law; for the statute recites, that whereas the wicked, pernicious and dangerous practice of making, forging and publishing false and untrue charters, evidences, deeds and writings, hath of late been more practised, &c. which seemeth to have grown chiefly by reason that the pains and punishments limited for such great and notable offences by the laws and statutes of this realm before this time have been, and yet are so small, mild and easy, &c. so that statute takes notice, that forging of writings was punishable by law before that statute, that is by the common law; for it says, by the laws and statutes of the realm. And they farther said, that this was not a new point, and that they relied on the cases which had been cited by the counsel for the king. 5 *Mod. Rep.* 137. 1 *Salk.* 342. The defendant was indicted for forging or causing to be forged a bill of lading; and this was at common law, as appears in 5 *Mod.* 137. The king *v. Stocker*, the court held the indictment ill for incertainty, but not because the offence was no forgery at common law, and not punishable. 1 *Sid.* 278. The king *v. Ferrers*. The defendant was indicted and convicted for forging an acquittance, the record of which is in *Tremaine's Intr.* 129, where it appears to have been an indictment at common law, and the defendant was fined, and bound to his good behaviour, *Raym.* 81. *Farr's* case. Indictment at common law, for forging a warrant of attorney, and judgment of fine, and pillory, and imprisonment. 2 *Sid.* 71. *Dudley's* case, for forging the entry of a marriage in a register. *Rex v. Penny*, &c. *Intr. H.* 20 *Car.* 2. *B. R. Crown Off. Roll.* 21. indictment for forging a general release at common law. *Hil.* 34 *Car.* 2. *Rot.* 35. The king *v. Sheldon*. Indictment for forging a bill of exchange at common law, and judgment against the defendant. And lately a case of the same nature between the king and *Ward*, and conviction at the *Old Bailey*. [That was the present defendant's brother.] The defendant escaped, and has not been took since. *Stiles* 12 *Savage's* case, for forging of letters of credit, and also for a cheat. 1 *Sider.* 142. The king *v. Dikins*, for forging a protection of Sir A. A. C. 1 *Salk.* 400. The king *v. Yarrington*. And *Porteus* justice cited the queen *v. Traversse*, which was an indictment at common law, for forging the indorsement on an army debenture; for it was indorsed to *Bridgett Graddon*, and the defendant altered the name, and made *George Graddon*, and judgment was given against the defendant.

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As to the objection made from the cases for words, the reason for those cases was, because it did not appear, what the writing was that was forged, and it might be a writing of no consequence, or that could prejudice no body, and the rule was at that time to take words *in mitiori sensu*. But the chief justice said he apprehended, if the case of *Vannor v. Wootton*, Cr. Eliz. 166. was to be adjudged now, it would be adjudged otherwise than it was; for it appears by the words, a forging of writing was meant, whereby the forger had prejudiced his sister, for he received the rents by reason of that forgery, which were due to his sister, which imported a complete forgery; and whether the writing was a letter or other writing, the scandal was the same: and the case was relied on, as cited by *Croke*, as adjudged 3 Eliz. before 5 Eliz. in *Yelv.* 146. was of the same case as *Cr. Eliz.* 166. which was in 32 Eliz. long after the statute of 5 Eliz. As to the objection raised from the statute of 33 H. 8. c. 1. that if such sort of forgeries as these were punishable at common law, that statute was unnecessary: the court said, that that statute did not create new offences, for the crimes therein mentioned were crimes at common law, but increased the penalty. 2. Upon that statute no fact was punishable, but where the offender had carried his fraud into execution, and got the money or goods into his possession, whereby the party defrauded was actually prejudiced. But a man is punishable for a forgery, if it may be prejudicial, though the mischief is prevented by the discovery of the forgery. And that therefore is an answer to another objection made by the defendant's counsel, that it does not appear, the duke of B. was actually prejudiced; it not being averred, that the delivery of the allum was avoided in fact by this forged indorsement; for if he might be prejudiced by it, that makes the forgery an offence, for which an indictment would lie at common law: as if A. forges a bond in B.'s name, though B. is never obliged to pay the money, an indictment without all question will lie at common law. And for these reasons the court were clear of opinion, that this offence, of forging an indorsement on the back of the certificate, whereby the duke of B. might be defrauded of the allum, was a forgery, for which this information will lie at common law.

The next objection the defendant's counsel made was, that if the offence was a forgery punishable at common law, yet the fact was not set out in this information sufficiently, for the court to found a judgment upon: for unless the defendant was chargeable to deliver the allum at the time when he made this forged indorsement, there was no possibility the duke of B. could be prejudiced by it, nor can it be said to be done to avoid the delivery of the allum. As it stands upon the information it is, *Memorandum*, That the attorney general, *Wednesday proxima post tris Trin.* 11 Geo. [which was in Trin. term 1725.] comes and informs the court, that

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that the defendant *onerabilis existens ad deliberandum* 315 tons of allum to the duke of B. *ad certum diem jam praeteritum*, he the said defendant, contriving and intending the said duke of the said allum to defraud, *et ea intentione* to avoid the delivery of the said allum, 1 Feb. 11 Geo. [which was in Feb. 1724.] forged the indorsement, &c. So that the *onerabilis existens* must refer to the exhibiting the information, which was long after the forgery; and if so, then the defendant does not appear to be chargeable to deliver the allum when the forgery was committed; or if it does refer to *ad diem jam praeteritum*, it is liable to the same exception; though these words seem to make it worse, as making it more uncertain. But they insisted, it could not refer to 1 Feb. 11 Geo. by any grammatical construction, and the rather because before the time of the forgery is laid, a new sentence is begun by the *ipse idem Johannes Ward machinans et intendens*, &c. But the information should have gone on, *et sic onerabilis existens* 1 Feb. 11 Geo. did forge, &c. And for this Cr. Jac. 214. Sir Nicholas Point's case was cited, as a case in point, where in an indictment for a forcible entry it was laid, that such a day and year the defendant entred into such lands, *existens liberum tenementum* of J. B. and with force expelled him; and (a) judgment was reversed, for not saying *adiunc existens*, for it might be the freehold of J. B. at the time of the indictment, and not at the time of the entry. Cro. Jac. 639. Bridge's case, Palm. 426. Turner's case, and 2 Roll. Rep. 65. Ailing's case, agree with Point's case. Dier 164. b. They relied also much on the case of the king v. Knight, H. 11 W. 3. B. R. ante 527. where an information was against the defendant, for that he *existens nuper receptor generalis* of the customs, falsely such a day indorsed exchequer bills, *quasi receptas pro custumis*, &c. and the fact with which he was charged being no offence if it had been well laid, unless he was receiver general, &c. at the time when he indorsed the exchequer bills, &c. the whole court held the information ill, because it was *nuper receptor*, and held it could not be made good by inference or intendment, but that a criminal charge ought to be express, and not to be made out by argument; and after a verdict in that case the judgment was arrested. And therefore the defendant's counsel insisted, the information was naught, and no judgment could be given against the defendant upon it.

(a) Acc. Latch.
109.

But to this it was answered by the counsel for the king, and held by the whole court, that it did sufficiently appear, that the defendant was chargeable to deliver the allum at the time when he made this forged indorsement. For the forgery being laid to be done 1 Feb. 11 Geo. and the forgery being laid to be, *ea intentione* to avoid the delivery of the allum, it is the same as if it had been laid, *sic onerabilis existens*

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existens, he had the 1 Feb. 11 Geo. forged the indorsement; which the counsel for the defendant agree, would have been good. And the *existens onerabilis* referring to the person, shall not refer to the time of exhibiting the information, but the committing the offence. So is *Cro. Jac.* 609. *Johnson's* case, and 2 *Lev.* 179. the king v. *Moore*, in an information on the statute 4 & 5 P. & C. M. c. 8. for taking a woman out of the custody of the guardian, it was set out, that the defendants *existentes* above the age of fourteen years, took *A.* then being a virgin unmarried, and possessed of goods, and seised of land, of a great value, out of the custody of her mother, *contra formam statuti*: after verdict for the crown it was moved in arrest of judgment, that 'tis not said, that the defendants at the time of the taking were above the age of fourteen years, for the *existentes* refers to the time of the information exhibited, and not of the taking; as in the cases of forcible entry, *existens liberum tenementum* refers to the time of the indictment, and not of the entry. *Sed non allocatur*: in those cases the *existens* follows the verb, viz. *ipsum disseisivit* of such land, *existens liberum tenementum*, and therefore might be only the freehold after the disseisin; but in the case of *Moor* the *existens* precedes the verb *ceperunt*, and so refers and is tied up to time of the taking.

Another exception was taken to the information, that it was not shewn, how the defendant was chargeable to deliver the allum, whether it was by obligation, deed, &c. for it ought to appear to the court, that they might judge, whether he was chargeable or not. But to this it was answered, that the forgery was the *gist* of the information, and that this was but an inducement to it; and that there was no manner of necessity, to shew how the defendant was chargeable to deliver the allum. And of that opinion was the whole court.

Another exception was taken to the information, that the word tons in the written certificate, relating to allum, imported a measure by weight, but in the information it was laid so many *dolia*, *Anglice* tons; whereas the word *dolum* properly signified a liquid measure, as a hoghead, but not a measure by weight; and since there was a proper Latin word for tons by weight, the *Anglice* would not help it. But it was over-ruled, because *dolum* in *Littleton's* dictionary signifies a ton; and so in *Townsend prepar.* &c. 145. for a ton by weight both *tonna* and *dolum* are put. Another objection was taken, that the information used the word *contrafecit*, whereas it ought to be *confrofecit*. But it was held good; and so is *Co. Intr.* 360. for counterfeiting the coin, *confrofecerunt*.

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Mr. *Filmer* for the defendant took a farther exception to the first information, that the instrument was not laid to be published as well as forged. For the making and not publishing any such writing, is not punishable at all. *Sheph. Epitome* 610. and the precedents are to lay a publication. *Wyll's Precedents* 108. 6 *preced.* in *Tremaine's Entries*, all at common law. And though the second information lays a publishing, yet it does not refer to the instrument in the first information, for it is not said he did publish *idem scriptum*, but *quoddam scriptum*; nor is it said, he published *ut verum scriptum*, as that of the King *v. Teners* is laid. *Tremaine's Entries* 129. The case is shortly mentioned 1 *Sid.* 278. But as to this, the court held it not necessary, to lay a publication in the first information, for the forgery was punishable, though the party was not actually prejudiced if he might be prejudiced by it, and therefore they held it good, though the information did not shew the duke was actually defrauded of the allum; and for the same reason, there was no necessity to lay, that the writing was published.

Dier 302.

As for the second information, the court being of opinion that the first was good, it was not much for the defendant's service, if there was a fault in the second, because judgment would be given against him on the first. However, Mr. attorney general answered as to that, that this being an information for a forgery at common law, it was not necessary to say, he published it *ut verum scriptum*, that being only requisite in prosecutions upon the statute of 5 E. 4. 14.

Mr. *Strange* for the defendant took another exception, that there was no entry on the record, that proclamation was made, if any body would inform the king's justices, &c. But that was presently over-ruled by the court, that such proclamation was only for the benefit of the king, and the defendant was not prejudiced by the omission; and *Coke's Intr.* 353. b. hath no entry of such proclamation. And judgment was given for the king; and the defendant *Ward* was ordered to stand in the pillory before *Westminster-ball-gate*, and fined 500*l.* and committed to the king's bench prison, there to lie, till he paid his fine.

Bindover *vers.* Sindercombe.

Intr. Hil. 12 G.
C. B. Rot. 1205.

Locus in mes-
suagio vocatus
a passage-room
is a sufficient de-
scription of the
place for which
an ejectment is
brought, if the
part of the house
in which it lies
is ascertained.

So is parcella aut
pars areae pesca-
rie, pomarii &c.
If the abutments
of such parcel
or part are set
out.

So in a close of
pasture called five
acres, containing
by estimation
fifty.

No objection can
be taken to an
abutment after ver-
dict, that it is
"a bound to be
erected."

At least if the
line in which
such bound is to
be erected, is
described.

A place to keep
fish in may be
called a mote.

IN error upon a judgment for the plaintiff in the common pleas, after verdict and damages intire, the errors insisted upon were the uncertain description of the things in the declaration, for which the ejectment was brought. And serjeant *Chapple* for the plaintiff in error laid it down as a settled rule, that the (a) certainty of the thing ought to appear to be such, that the sheriff might know, of what to deliver possession: now here the ejectment is for *illas partes messuagii in Nether-Stowey et Over-Stowey in comitatu Somerset praedicto scilicet, unum locum vocatum a passage-room, ex Boreali parte ejusdem messuagii*; but *locum* is altogether an uncertain description of the thing, and cannot be helped by the *vocatum a passage-room*. The next error insisted on was, that the ejectment was for *illam parcellam areae antrorum quae jacet ex Boreali Occidentali parte semitae ducentis a porticu antrorsum ad coquinam praedictam* [a coquina being mentioned before] and for *parcellam areae muratae pone praedictum messuagium quae jacet ex Boreali parte semitae ducentis a praedicto messuagio ad pomarium*, and also for *illam parcellam pomarii quae jacet ex Boreali parte bundae fore erecti a sepe magni gardini versus Oriental. in directa linea trans pomarium et ex transverso piscinae, vocatae a mote, usque ad pratum ad distantiam quadraginta et sex pedum versus Austral. a fossa quae ducit a magno gardino ad latrinam*; and also for *illam partem piscinae, vocatae a mote, saliter separatam per bundam praedictam quae jacet versus Boreal.* and for *unum clausum pasturae, vocatum five acres, continens per estimationem quinquaginta acres, &c.* And serjeant *Chapple* for the plaintiff in error argued, that *locum* is as uncertain as *clausum*, and not such a proper description of a thing, as the law took notice of, and therefore fell within the reason of *Savel's case*, 11 Co. 55. that *parcellam areae, parcellas pomarii, partem piscinae*, were liable to the same objection, and were the same as *peciae terrae*. But it was adjudged *Moor*, 702. pl. 976. *Palmer v. Humphry*, that an ejectment could not be maintained for *peciae terrae*, and the judgment given for the plaintiff in that case was reversed. Nor would an ejectment lie for *clausum vocatum dove-cote close*, containing three acres, but that the ejectment ought to be of so many acres of land or meadow, &c. 11 Co. 55. *Savel's case*: which was agreed by Holt chief justice to be law, 1 Salk. 254. in the case of *Knight against Syms*; and there the ejectment was for five closes of arable and pasture, containing twenty acres, and there judgment was arrested. And Mr. *Fenwick* for the plaintiff in error cited a case between *Holdfast*

(a) Vide Burr. 629, 2672.

and *Wright*, where in ejectment brought for a close of meadow called *Partridge Lees*, containing — acres more or less, judgment was arrested last *Michaelmas* term by the common pleas, because the certainty of the acres ought to appear in the declaration: but the more or less made this declaration uncertain.

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But as to the exception to the declaration, that the ejectment did not lie for the *locum vocatum* a passage-room, the court held the declaration was good; for a part of a house called *locus*, with a name, as here the passage-room, and further ascertained in which part of the house it lies, is sufficiently ascertained, to enable the sheriff to deliver possession. And so it is adjudged in point in the exchequer-chamber, *Hutchinson v. Puller*, *Hil. 34 Car. 2. C. B.* where the ejectment was brought for a place called the *vestry*, and judgment given for the plaintiff in the king's bench was affirmed.

As to the exceptions of *parcella arear*, *parcella pomarii*, *partem piscinar*, &c. the court held, they were certain enough, because they were described by the abuttals sufficiently, viz. *parcellas arear* *antrorsum quae jacet*, &c. as in the declaration. But as to one of the abuttals, viz. *illa parcella pomarii quae jacet ex Boreali parte bundae fore erectae a sepe magni gardini versus Orientali. in directa linea trans pomarium, et ex transversa piscinar vocatae a mote, usque ad pratum ad distantiam quadraginta et sex pedum versus Australi. a fossa quae ducit a magno gardino ad latrinam*, it was objected by the counsel for the plaintiff in error, that that abuttal could not ascertain, what parcel or part of the orchard was intended to be described by the declaration, because it referred to a boundary to be erected, *bunda fore erecta*, which no body could guess what it was to be. But as to this the court were of opinion, that this was certain enough; for though the boundary was said to be erected, yet this being after a verdict, they could not intend, but that evidence was given upon the trial, to support this description, and that though the boundary was not perfectly erected and compleated, there were some marks, where it was designed to be erected: however, that the laying it from the bound to be erected from the hedge of the great garden *versus Orientali. in a direct line trans pomarium, &c. usque ad pratum, &c.* sufficiently ascertained the parcel of the orchard, for which the ejectment was brought, and that the sheriff might be thereby well directed to deliver possession. To this description another exception was likewise took by the counsel for the plaintiff in error, that it was laid to be *ex transversa piscinar vocatae a mote*, whereas that is not a proper word for a mote, for *piscina* only signifies a place to keep fish in; but it should be *fossa*, which more properly signifies a mote,

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and this goes to another part of the declaration, viz. *præter piscinas vocatae* a mote. But to this it was answered, that though *piscina* might signify a place to keep fish in, yet this might be so, and yet have the name of or be called a mote; and therefore it was well enough.

The last exception was, that the ejectment was for *clausum pasturæ vocatum* five acres, containing by estimation five acres. And for this they relied upon *Savel's* case as in point, which *Holt* affirmed was law. But to this it was answered, that *Savel's* case did not come up to this, for in *Savel's* case there was no mention of what sort of land it was, whether arable, meadow, or pasture, which seems to be the best reason for that judgment; but here it is said pasture: and therefore after *Savel's* case, *Cro. Jac.* 435, *Wikes v. Sparrow*, an ejectment for two closes, called *higher Gukwell* and *lower Gukwell*, containing three acres of land, without shewing what every close contained, it was adjudged for the plaintiff: and as to the judgment in *Savel's* case in 2 *Ro. Rep.* 167. it is said, that judgment was given on a sudden. And as to the case cited out of *Salkeld* 254, *Knight v. Syme*, the reason of that judgment appears by the book to be, because it was not shewn, how many acres there were of arable, and how many of pasture. So is *Cro. Car.* 573. *Martin v. Nicholls*. And judgment was affirmed by the unanimous opinion of the court, *Jan.* 31, 1726. As to the case cited of *Heldfast v. Wright*, *quære* if it was so adjudged, for I should have taken it to be well enough?

The King *vers.* Seawood,

S. C. Str. 739.

An information may be amended in a point to which the defendant has excepted by plea in abatement. vide ante 1397.

AN information was filed against the defendant by the addition of *generosus* for a challenge. The defendant pleaded, that he was a surgeon, &c. And upon a motion for leave to amend the information, a rule was made, to shew cause, &c. and upon hearing counsel on both sides the rule was made absolute, for amendment of the information upon payment of costs, this being a suit not carried on by the crown. The defendant shall have costs for not going to trial, where the prosecution is not by the king. The King *v. Johnson*, cited by my brother *Fortescue*. In the case of the King *v. Tutchin*, there was a plea of *misnomer* in abatement, and the attorney-general had leave to amend, and gave the defendant an imparlance. *Friday, Feb. 3. 1726.*

The inhabitants of Woodend in the parish of Blackesley in the county of Northampton *vers.* the inhabitants of Paulspury in that county.

3. C. Str. 746. 2 Sess. C. 124. Foley 226. Fort. 328. but very differently reported 1 Barnard. B. R. 11.

TWO justices of the peace of the county of Northampton, by their order dated the 19th of March, 12 Geo. 1725, removed *Elizabeth Buncher*, a poor person, from the parish of *Paulspury* to the endship of *Woodend*, as the place of her last legal settlement. Which order was delivered into the general quarter-sessions held for the county of Northampton, 19th of April, 1726. by the two justices: at which sessions the inhabitants of *Woodend* appealed against the said order: after hearing which appeal the sessions stated the fact specially, *viz.* that it appeared to that court, that *John Buncher* rented an house and some closes at *Woodend* about 30*l.* per annum, and inhabited the said house for several years, and died insolvent, and left a widow and one daughter, whose name is *Elizabeth Buncher*; the widow soon after removed into *Paulspury*, into a messuage or tenement about 40*s.* per annum value, and some lands about 10*l.* per annum, that was her own estate for life, both house and land being copyhold, and took her said daughter with her, then about the age of fourteen years; and the daughter lived with her mother at *Paulspury* above two years in the said messuage or tenement; but the mother let the said land to a tenant; whereupon this court is of opinion, that the said *Elizabeth Buncher* is settled at *Woodend*, the place of her father's settlement, and not at *Paulspury*, where she lived with her said mother as aforesaid, and therefore do confirm the order above recited for sending her to *Woodend*. And these orders being removed into the king's bench by *certiorari*, Mr. *Reeve* moved last term to quash them, because it appeared by the fact stated, the last legal settlement of *Eliz. Buncher* was at *Paulspury*, because the mother being a widow, having gained a new settlement after her husband's death, the daughter gained a settlement also, as part of her family. And there is no difference between a father's gaining a settlement and a mother's in such a case as this, for the mother is obliged to provide for her children after her husband's death, as the father was when living; and she could not leave this daughter behind her, neither could she be removed from her. But if after the husband's death she had married a man settled in another parish, tho' her children by her former husband must have gone with her for nurture, yet they would have been no part of her second husband's family, and therefore would have gained no settlement thereby in the parish where the

If a widow gains a settlement after her husband's death, such of her children as have never been emancipated, will be settled in the place in which she gains such settlement, and not in the place in which the husband was settled. R. acc. Foley 254. Fort. 218. Burr. S. C. 49. No. 15, 64. No. 19.

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father in law was settled. And for this he cited the case of the inhabitants of *St. Catherine's* near the *Tower*, and the inhabitants of *St. George's Southwark*. *Foley* 254. *Fort.* 218. as a case expressly in point; and such orders as these were quashed, *Mich.* 1 *Geo.* 1714. for the reasons by him before alleged.

But Mr. *Chauncy* for the inhabitants of *Paulspury* said, the difference was, between a settlement gained by the father, and a settlement gained by the mother. In the first case it had been adjudged, the settlement of the father gained his children a settlement; though *Holt* at first doubted of that, 2 *Salk.* 528. between the inhabitants of *Cumner* and *Milton*. But there was not the same reason as to the mother's settlement, because the mother was not obliged to take care of the children.

The court ordered the copy of the orders in this case, and of the case of *St. Catherine's* and *St. George's* that was cited, to be delivered to them, and that it should be stirred again this term. And upon reading the orders relating to *St. Catherine's* and *St. George's*, cited by Mr. *Reeve*, they were thus. Two justices of the peace of *Surrey* by their order dated the 25th of *January* 1713, removed *Lydia*, *Elinabeth*, *Ann*, *Catherine*, *James* and *Samuel Cloyd*, from the parish of *St. George Southwark* in *Surrey*, to the parish of *St. Catherine* near the *Tower* in *Middlesex*, as the place of their last legal settlement; and upon an appeal to the quarter-sessions of *Surrey*, held at *Ryegate* 6 *April* 1714, they made a special order, viz. reciting the order of the two justices: now upon examination of witnesses upon oath it appears to this court, that the said *Lydia Cloyd*, aged sixteen years, *Elinabeth Cloyd*, aged fourteen years, *Ann Cloyd*, aged ten years, *Catherine Cloyd*, aged eight years, *James Cloyd*, aged four years, and *Samuel Cloyd*, aged three years, were the sons and daughters of *John Cloyd* and *Lydia Cloyd*, which said *John Cloyd* the father at the time of his death was legally settled in the said parish of *St. Catherine*, and there died, and that none of the said children have by any act of their own gained any settlement distinct from the settlement of their father; but that after his death *Lydia* the widow and the said six children went to dwell at the said parish of *St. George Southwark*, where she took a house of 12*l.* per annum, and lived in the same above four months, and paid the queen's tax, but never paid any rent to her landlord: now upon hearing, &c. this court is of opinion, that the said six children, not having gained any settlement themselves, are settled at the said parish of *St. Catherine*, where their father *John Cloyd*, now deceased, had his last legal settlement; and gained no settlement by living in the said house with their mother, and

dismissed the appeal, and confirmed the order of the two justices. And these orders being removed into the king's bench by *certiorari*, were quashed, *Mich. 1 Geo.* for the reasons alleged by Mr. *Rose*. And therefore *February* the 13th, 1726, upon the authority of that precedent the court quashed the orders in the present case, adjudging the place of *Elizabeth Buncher's* last legal settlement to be at *Paulspury*.

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Easter Term

13 Georgii regis, B. R. 1727.

Shipman against Lethieullier.

S. C. 1 Earnard. B. R. 12, 14.

Tho' the custos brevium has once returned upon a certiorari in error that there is not a particular writ of a particular term, he may upon a second certiorari return that there is.

Shipman brought a writ of error upon a judgment in an *indebitatus assumpsit* brought against him by Lethieullier in the common pleas, by *nihil dicit*, and a writ of inquiry executed, and final judgment given against him for 1295^l. &c. and assigned the general errors, and also that there was no writ of inquiry of damages between the said parties to the said plea, or inquisition thereupon taken, filed or remaining upon record in the common pleas, returnable in *praedicto crastino ascensionis anno regni domini regis duodecimo, in termino Paschae anno, &c. duodecimo*: whereupon he prayed a *certiorari*, directed to the *custos brevium* of the common pleas, to certify, &c. To which the *custos brevium* of the common pleas returned, *quod non habetur aliquod breve de inquirendo de damnis et inquisitio superinde capta inter partes praedictas de placito praedicto in custodia sua vicecomiti London directum* returnable in *crastino ascensionis domini praedicti termini Paschae de recordo affilatum, &c.* Upon which the defendant in error Lethieullier suggests, that there is a writ of enquiry of damages between the parties in the said plea in the custody of the *custos brevium* of the common pleas *de termino Paschae praedicto de recordo affilatum*, and prays another *certiorari*, &c. To which the *custos brevium* of the common pleas returned, *quod scrutatis brevibus de inquirendo de damnis ipsius domini regis vicecomiti London directis in custodia sua de recordo affilatis de termino Paschae anno regni sui duodecimo, et retornabilibus in crastino ascensionis Domini in dicto termino, habetur quoddam breve de inquirendo de damnis vicecomiti London directum inter partes infra-nominatar de placito infrascripto in custodia sua praedicti termini et retornatum de recordo affilatum cum inquisitione superinde*; and then sets out the writ of inquiry, and the inquisition, &c. which warranted and agreed with the record. And thereupon the defendant in error pleaded, *in nullo est erratum*. And ser-

jeant

jeant Richard Comyns for the plaintiff in error insisted, that the judgment ought to be reversed, because the *custos brevium* could not return upon the second *certiorari* a fact in every particular contrary to his return upon the first *certiorari*, as here he has done. And the court cannot tell to which return to give credit, there being the same reason to give credit to the return of the first, as of the second *certiorari*. And therefore it does not appear certainly to the court, that there was any writ of inquiry and inquisition, to induce them to affirm the judgment: and he cited 1 Leon. 22. *Darrell v. Thin*, and 176. *Sed non allocatur*; for here being a positive return of a writ of inquiry, which warrants the record, they will take that to be true. And judgment was affirmed May 22d, 1727. See *Cro. Jac.* 130, 131. *Markham v. Bessum*, *Cro. Jac.* 597. *Johns v. Bowens*, 1 Salk. 266. Note, *Fortescue* justice said, the case of *Overton v. Broker*, M. 12 Geo. B. R. was the same case, except that that was in the case of an original writ; but I did not remember that case.

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v.
LATHING-
LIER.

Overton vers.
Broker.

Monk vers. Cooper.

S. C. Str. 763.

ROGER Monk assignee of Philip Gulton and Elizabeth his wife, surviving executrix of Margaret Saunders, brought an action of covenant for non-payment of rent for a house upon London Bridge, and declared, that Margaret Saunders, 30 August 1714. being possessed of the demised premises for a term of sixty years, which commenced in 1695. leased the same by indenture to the defendant from Lady day 1716 for twenty-one years, rendring yearly during the said term of twenty-one years from and after the commencement thereof 25*l.* per annum, payable quarterly; that the defendant covenanted by the said indenture, that he, &c. would pay the said rent to the said Margaret, her executors, administrators and assigns, during the said term, after the commencement thereof; that the defendant entered, and held the premises till the 30th of September 1726, that Margaret Saunders being possessed of the reversion made her will, and the said Elizabeth, and another since deceased, her executors, and died 17th of Nov. 1714, then they set out, that the will was proved, &c. and Philip Gulton and Elizabeth his wife Decem. 21, 1725. bargained and sold and assigned all their interest in the reversion to the plaintiff, of which the defendant had notice, &c. then the breach is assigned in the defendant's not paying the rent at the several quarter-days, Christmas 1725, Lady-day, Midsummer, and Michaelmas 1726. The defendant prayed over of the lease, which being set out, among other the covenants, there was a covenant from the defendant, that he would keep the

If the lessee of a house covenants to pay the rent agreed upon during the term, he is compellable to pay it, tho' the house is burnt down and the landlord bound to rebuild it. R. acc. 1 T. R. 370. and vide 1 T. R. 710.

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the demised premises during the said term, except the same should happen to be demolished or damaged by fire, and would so deliver them up at the end of the term, except as before excepted. Then the defendant pleads, that before Michaelmas 1725, and during the defendant's occupation of the premises, viz. 20th Sept. 1725, the demised premises against the defendant's will *igne consumpta fuerunt*, and were not rebuilt by the said Philip, Elizabeth and Roger, or any of them, for a whole year next following Mich. 1725. *neque habuit aut habere potuit idem Thomas aliquem usum, beneficium, aut occupationem inde durante toto tempore praedicto*, and therefore prays judgment, if he ought to be charged with the rent for those four quarters. The plaintiff demurred, and the defendant joined in demurrer. Mr. Strange argued for the defendant, that the rent was payable only for the enjoyment of the demised premises, and therefore since he was hindered enjoying them, by their being burnt down, for which he was not to answer, nor obliged to repair by his express covenants, but it belonged to the plaintiff to rebuild them; it would be extremely hard to make him pay the rent for the time he could have no enjoyment, nor use, nor benefit of them. *Sed ista curia contra*, that the defendant was bound by his express covenant, to pay the rent during the term. And judgment was given for the plaintiff May 12, 1737.

The King against Philip Wyatt.

S. C. 1 Sess. Cas. 374.

A conviction may state an offence to have been committed in a vill, tho' the statute upon which it is grounded gives part of the forfeiture for such offences to the poor of the parish in which they are committed.

THE defendant was convicted by lord Barrimore a justice of peace for the county of Chester, for that he not being qualified according to the statute, the 2d of Jan. 13 Geo. at the villa of Mottram Andrews in the said county, two greyhounds for killing and destroying game *illicite in custodia sua habuit et adtunc et ibidem usus fuit* to destroy the game, contrary to the statute; for which he was adjudged to forfeit five pounds. This conviction being removed by *certiorari* into the king's bench, Mr. Fazakerley for the defendant took an exception to it, that by the statute of 5 Ann. c. 14. an act for the better preservation of the game, upon which statute this conviction is grounded, by sect. 4. one half of the 5*l.* forfeited is to be paid to the informer, and one half to the poor of the parish where the offence is committed. But in this case it does not appear, that the offence was committed in any parish, for both the information and the oath of the witness allege the offence to have been *apud villam de Mottram Andrews in comitatu Cestriae*, and the judgment of the justice is, *quod mihi praefato iusticiario constat, quod praedictus P. W. est culpabilis de praemissis praedictis in informatione praedicta specificatis et ei impositis modo et forma prout in et per informationem praedictam superscribitur*.

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superius allegatur. But there does not appear to be any such parish as *Mottram Andrews*, and consequently the poor of the parish will be deprived of their moiety of the 5*l.* forfeited. *Sed non allocatur*; for *per curiam*, if there was such a parish as *Mottram Andrews*, it shall be *prima facie* intended to be co-extensive with the *villæ*. But if the offence was committed in a *villæ*, which was extra-parochial (which may be) then the informer will have the whole penalty. And the conviction was affirmed *May 13, 1727. per totam curiam.*

The King *against* the commissioners of sewers for the levels of Tendring, Lexden and Winstree, in the county of Essex.

S. C. with some difference. (a) Str. 763.

A *Mandamus* bearing *teste* the 10th of February, 12 Geo. returnable *Wednesday proximo post quindenam Paschæ* was directed to the defendants, commanding them to make a rate upon the occupiers of lands within the hundreds of *Lexden* and *Winstree*, to reimburse *Daniel Bayley* expeditor of those hundreds 349*l.* 5*s.* 8*d.* which he had disbursed, and had been allowed him by the commissioners on his account. To which the defendants returned, that 25 Nov. 1721. they made a rate upon the occupiers of lands within the levels of the hundreds of *Lexden* and *Winstree*, within the limits of their commission, for 799*l.* 17*s.* 4*d.* &c. which when collected will be sufficient and applicable to repay the said *Daniel Bayley* the said 349*l.* 5*s.* 8*d.* which rate they caused to be delivered to the collector, &c. with the privy and consent of the said *Daniel Bayley*, to collect and levy, &c. for the uses aforesaid, which rate is still in force: then they further return, that the king the 17th of Jan. the second of his reign, by his letters patent appointed them commissioners, &c. which commission, not being superseded, by virtue of the statute expired and determined 17th of Feb. 12 Geo. and that the *mandamus* was delivered to them 12 Feb. 12 Geo. *et non antea quodque propter temporis brevitatem ante expirationem et determinationem commissionis nostræ prædictæ executionem brevis sive præcepti illius facere non potuimus, prout interius nobis præcipitur.* And the court were of opinion, that this return was good, because the time was too short for the commissioners to make a new rate. And if a peremptory *mandamus* should be granted, the commissioners could not now make a rate, the commission being expired.

*Tis a good return to a *mandamus* commanding commissioners of sewers to make a rate to reimburse an expeditor that they had before the writ issued made a rate by which he would be reimbursed, and that their commission expired within so short a time after the service of the writ, that they could not make a fresh rate.

(a) In Str. the return is stated to have been merely that the commission expired in four days after the delivery of the writ, so that the commissioners had not time to make a rate.

Stanton *vers.* Smith.

S. C. Str. 762.

'Tis actionable
to say of a
tradesman, "He
is a sorry pitiful
fellow, and a
rogue, he com-
pounded his
debts at 5s. in
the pound," tho'
there is no col-
loquium of his
trade. Vide ante
610. Com.
Action upon
the case for de-
samation. D. 25.
2d ed. vol. 1.
p. 383.

IN an action upon the case for words, the plaintiff declared, that he was a person of good name and condition, and now is, and at the time of speaking the words aftermentioned, and for seven years before, was a brewer, and in that trade got his livelihood and great gains, and always paid his debts to the full without any compounding; the defendant maliciously intending to bring the plaintiff into discredit, and to bring him into disgrace with all the king's subjects to whom he was known, the defendant the 4th of *Octob.* 13 *Geo.* at, &c. spoke several false and scandalous words (mentioning them particularly in the declaration, and laying them several ways) of the plaintiff, *ad damnum* 200*l.* The defendant as to all the words in the declaration, except these, *viz.* "He is a sorry pitiful fellow, and a rogue, he compounded his debts at five shillings in the pound," pleaded not guilty, whereupon issue was joined; and as to those words the defendant demurred, and the plaintiff joined in demurrer. Mr. *Theed* for the defendant argued, that these words were not actionable, for there is no *colloquium* laid of his trade. He cited *Noy* 77. *Marshall v. Allen*. He is a base broken rascal, and hath broken twice, and I will make him break a third time. The court seemed to be of opinion, that the words were not actionable, and a rule was made for judgment for the defendant, unless cause, &c. [See the same case *Latch.* 114. by the name of *Hill's* case, where it is said, the plaintiff had not alleged he was a tradesman, but that he was an honest subject, and got his livelihood by buying and selling only, and for that all the judges agreed that judgment should be arrested; but otherwise it had been if he had been a tradesman.] He cited also 2 *Salk.* 694. You are a cheat, and have been a cheat divers years, spoke of a tradesman, and judgment was arrested. *Savage* against *Robery*. But we were all of opinion, that such words spoke of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable. Judgment was given for the plaintiff, *May* 9.

Angus Mackleod *vers.* John Snee, Francis Pargiter, and William Beckin.

S. C. Str. 762. and with an inconsiderable difference. 1 Barnard. B. R. 12.

ERROR on a judgment given against *Mackleod* in the common pleas, in an action on the case brought upon several promises against him by *Snee*, *Pargiter*, and *Beckin*; wherein they declared, that they, and one *John Dundas* and *Charles Savers* were merchants, &c. and that the said *John Dundas* 25 May 1724, at London, &c. drew his bill of exchange according to the custom of merchants, dated at *Edinburgh*, and the same day directed it to the defendant by the name of captain *Mackleod* of the late brigadier *Douglas's* regiment of foot, *et per billam illam requisivit* the defendant *unum mensem post datum ejusdem billae solvere praefato Carolo Savers vel ordini novem libras et decem solidos sterling, ut ejus quarter. dimid. stipend.* (*Anglice quarter half-pay*) a 24 die Junii A. D. 1724. usque 25 diem Septembris sequentem per advancement. *Anglice per advance, prout per advisamentum a praedicto Johanne Dundas*; that *Charles Savers* indorsed the bill payable to the plaintiffs *Snee*, &c. for value received, of which *postea, viz. 5 June 1724.* the defendant *Mackleod* had notice, and afterwards the same day and year accepted it, &c. then they laid several other counts in the declaration, &c. The defendant pleaded *non assumpsit*. And on trial before lord chief justice *Eyre* the jury found a verdict for the plaintiff, and 9l. 10s. damages besides costs; and found as to all the other counts for the defendant. And judgment being given for the plaintiffs, *Mackleod* brought this writ of error. And serjeants *Chapple* and *Whitaker* argued for the plaintiff in error, that judgment ought to be reversed, because this was not a bill of exchange, but was an appointment, or an authority, or order for the defendant to pay the 9l. 10s. As if one desire the cashier of the bank to pay money which would grow due for a dividend before hand, so this is only an appointment by an half-pay officer to the defendant, to pay by way of advance. In this case, the drawer never intended to make himself chargeable by this bill, for it is not said to be for value received; so that (they insisted) this could not be a bill of exchange as to the drawer; and if not, it cannot be such as to the acceptor: for it must be a bill of exchange, if at all, both to drawer and acceptor. And they compared it to the case of *Joceline v. Lasarre*, "Pray pay out of my growing subsistence," &c. no bill of exchange; [See before, 1362.] and to the case *Jenny v. Herle*, P. 10 Geo. B. R. 1724. "Pay to Mr. Jo. Herle 1945l. upon

Intr. Pasch. 12 Geo. B. R. Rot. 137.

Intr. Hil. 11 G. C. B. Rot.

1763 et 1769.

A written order to pay a sum of money as the drawer's quarter's half pay by advance on a day before the half pay will be due, is a bill of exchange.

A bill of exchange need not import to be drawn for value received. Vide Bayley 5. note i. post. 2555.

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"upon demand, out of the money in your hands belonging to the proprietors of the *Devonshire* mines, being part of the consideration money for the purchase of the manor of *West Buckland*," [Antq. 1361.] On the other hand it was urged by Mr. Reeve and Mr. Fazakerley for the defendants in error, that this was a good bill of exchange. And of that opinion was the whole court, for this bill was not payable upon a contingency, nor out of a particular fund, and is made payable at all events, and payable to order, and is drawn upon the general credit of the drawer, not out of the half-pay, for it is payable as soon as the quarter begins for the half-pay mentioned in the bill, which was not to be due till three months after. And judgment was affirmed by my brothers *Portescue*, *Reynolds*, and *Probyn* justices, and myself, May 2, 1727.

Istr. Hil. 13 G.
B. R. Roti

William Aslett *vers.* William Vincent.

A demurrer after issue joined occasions a discontinuance. Vide Com. Pleader. E. 1. 2d ed. vol. 5. p. 64. and Q. 3. 2d ed. vol. 5. p. 137. Q. Whether the general traverse can be taken to a plea justifying the entry into a house to distrain for rent, and seizing goods as a distress. S. C. but differently reported 1 Barn. B. R. 14. Vide ante 700. Com. Pleader. F. 18. Sec. 2d ed. vol. 5. p. 106. and see also 11 G. 2. c. 29. s. 21.

IN trespass for breaking the plaintiff's house, and taking away a great quantity of the plaintiff's goods then and there found, to the value of 100*l.* and converting them to his own use, and disposing of them, and disturbing the plaintiff in possession of his house, and keeping possession for three weeks, &c. As to the force and arms, and disturbing the plaintiff in the possession of his house, and keeping him out of possession, the defendant pleaded not guilty, and issue was joined upon that; and as to the rest of the trespass the defendant justified, that he was seised in fee of the house, and being so seised by indenture demised the said house to *Thomas Sanson* for fifteen years, rendering 34*l.* per annum, &c. and for a year's rent due Lady day before the time when, &c. he entered, and distrained the goods, and gave notice, &c. for what he had distrained the goods, and after five days from thence with the constable of the said parish, &c. caused the said goods distrained there to be appraised by two appraisers, by the said constable sworn, &c. and after such appraisement, for default of payment of the said rent, and replevying the distress, he sold the goods for 15*l.* 13*s.* 6*d.* being the best price that could be got for the same, towards satisfaction of the rent for which they were distrained, &c. prout si bene licuit; which is all the residue of the trespass, &c.

The plaintiff replied, that the defendant *de injuria sua propria absque tali causa* in his plea alleged, *praedicto tempore* quod, &c. *vi et armis domum praedictam fregit et intravit, et bona et catalla* of the plaintiff, &c. cepit, asportavit, et in usum proprium convertit et disposuit, modo et forma

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forma the plaintiff *superius versus eum queritur*; *et hoc petit quod inquiratur per patriam, et praedictus Willielmus Vincent inde similiter, &c.* then the defendant *dicit quod placitum praedictum* of the plaintiff *minus sufficiens in lege existit*, and so demurs generally; and the plaintiff joined in demurrer. Serjeant *Glyde* for the defendant argued, that the replication was ill, because the defendant by his plea had shewed, that he entred into the house by authority of law, to take a distress for the rent; and as to the goods he made a title under that distress, and therefore according to 8 Co. 97. *Crogate's* case, where the defendant claims an interest, or acts under an authority given by law, the plaintiff cannot reply generally, *de injuria sua propria absque tali causa*, but they ought to be answered. In 1 Lev. 307. *White* against *Stubbs*, in trespass for entring his close, and taking his goods, the defendant justified the taking *damage feasant*: the plaintiff replied, *de injuria sua propria absque tali causa*, the defendant demurred; and it was resolved, that the replication was ill, the plea in bar containing a title; which he relied on as a strong case.

Mr. *Reeve* for the plaintiff insisted, the replication was good; for the plea contained nothing but matter of fact; that the defendant did not make title to the goods, but only intitled himself to distrain them, and dispose of the distress, as the statute had directed; but that by the distress no property vested in the defendant. And as to *Crogate's* case, 8 Co. 67. where it is said, a particular answer ought to be given, where the party justifies under an authority given by law; he said, *Holt* chief justice, in the case of *Chance v. Weedon*, ante 700, which is now printed in 2 Salk. 628. denied that part of *Crogate's* case, and held, that where the defendant justifies by authority by common law, or of a general act of parliament, *de injuria sua propria absque tali causa*, is a good replication. However he said, here the defendant's demurrer came after issue was joined upon the *de injuria sua propria absque tali causa*, and therefore was ill. And upon that the court held, they could give no judgment. May 12.

Trinity Term

Anno regni 13 Geo. 1. et primo Geo. 2.
B. R. 1727.

Sarah Smith *vers.* William Jarves and James Baily.

An allegation that a man made a note in writing for himself and partner, subscribed with his own hand, and thereby promised for himself and partner, &c. implies that he signed it for his partner as well as for himself.

Vide ante 1376.
post 1542.

IN case brought by the plaintiff as indorsee of a promissory note against the defendants, the plaintiff declared, that the 28th of Feb. 1725. and long before, *et continuo postea hucusque*, the defendants were partners in *via mercandizandi et conjunctim negotiatorum* for their common advantage, and that the said 28th of Feb. 1725. at, &c. the said defendant William, for himself and the said James his partner, made his promissory note in writing with his own hand, subscribed according to the statute, &c. bearing date the said day and year, and delivered it then and there to one Peter Rich, by which note the said William, for himself and the said James Baily, promised to pay to the said Peter or order seven months after date of the said note 36l. 5s. for value received, &c. To this count (there being several other counts in the declaration, to which the defendants pleaded *non assumpsit*) the defendants demurred generally. And serjeant Glyde for the defendants insisted, that this note was not a negotiable note, nor indorseable to the plaintiff, within the act of 3 & 4 Ann. c. 9. because the plaintiff had not charged in the declaration, that the defendant William had signed the note for him and the other defendant Baily his partner. But per curiam, it is very good, for the plaintiff has said, the defendant William made it for himself and his partner, and subscribed it with his own hand, whereby he promised for himself and partner to pay, which shews sufficiently he signed it for himself and partner. And judgment was given for the plaintiff June the 8th, 1727.

Monday, June 12, Mr. Oneby being brought to the bar from Newgate, to hear the resolution of the court, the chief justice delivered the opinion of the judges, in the following manner.

The King *vers.* Oneby.

S. C. with the arguments of the counsel in B. R. Str. 766. and with the indictment, evidence and special verdict. 9 St. Tr. 14.

AT the general sessions of the peace held at *Hickes hall* for the county of *Middlesex* 28th of Feb. in the 12th year of his majesty's reign *John Oneby* of *St. Martins in the fields*, gent. was indicted, for that he the 2d of Feb. 12 Geo. at the said parish, feloniously, voluntarily, and of his malice forethought, made an assault upon one *William Gower*, Esq; and that he the said *John Oneby*, with a sword which he had then and there held drawn in his right hand, the said *William Gower* in and upon the left part of his belly near the navel feloniously, voluntarily, and of his malice forethought, did strike and thrust, giving the said *William Gower* then and there with the said drawn sword in and upon his said left part of his belly near the navel a mortal wound, of which mortal wound the said *William Gower* lived in a languishing condition from the said 2d of Feb. to the 3d day of the said Feb. on which 3d day of Feb. the said *William Gower* at the parish aforesaid of the said mortal wound did die; and so the jurors find, that the said *Oneby* the said *William Gower* feloniously, voluntarily, and of his malice forethought, did kill, and murder. Which indictment being delivered to the justices of gaol delivery for *Newgate*, the said *John Oneby* was arraigned thereupon, and pleaded not guilty. And upon the trial, which was had before Mr. baron *Hale* and Sir *William Thompson* recorder of *London*, the jury found the special verdict following, viz. that the said *John Oneby* and the said *William Gower*, together with *John Rich*, *Thomas Hawkins* and *Michael Blunt*, were in company together in a room in the *Castle-tavern* in the parish of *St. Martin's in the Fields*, in a friendly manner; that after the said *John Oneby*, *William Gower*, *John Rich*, *Thomas Hawkins* and *Michael Blunt*, had continued together in the said room for the space of two hours, a box and dice were called for; whereupon the drawer said, that he had dice but no box, and that thereupon the said *John Oneby* commanded the drawer to bring a pepper-box, and accordingly a pepper-box and dice were brought; that immediately after the said *John Oneby*, *William Gower*, *John Rich*, *Thomas Hawkins*, and *Michael Blunt*, began to play at hazard; and after they

The killing of a man may be murder altho' he had stricken the person who killed him before the mortal wound was given. Acc. ante 140. and see the books there cited.

A transport of passion shall never make the killing of a man manslaughter only, unless it deprived the party of his reasoning faculties from the time when it was raised until the giving of the mortal wound. S. C. 1 Barnard. B. R. 17. acc. Fort. 296.

Any act of deliberation in the interim affords a proof that the party was not deprived of his reasoning faculties during the whole of that period. S. C. 1 Barnard. B. R. 17.

A transport of passion shall not be taken to continue an immoderate length of time.

'Tis properly the province of the court to deter-

mine what acts afford proof of malice. D. acc. post 1534; vide Burr. 396. 474, 947. 3 T. R. 423. That deliberation, and within what time a transport of passion shall be taken to have subsided, vide *Retaple v. Appleton*. B. R. M. 23 G. 3. 1 T. R. 108, 169, 171. 'Tis a proof of malice to a man deliberately after a quarrel, you will have his blood. S. C. 1 Barnard. B. R. 17. of deliberation to call a man back into a room he has quitted. 'Tis never to be presumed that the dragging of a man took place upon a sudden quarrel.

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[*Erga* without
an *Anglice*.]

had played half an hour, the said *John Rich* asked if any of the company would set him three pieces of money called half-crowns, that thereupon the said *William Gower* in a jocular manner set three pieces of money called halfpence, and then said to the said *John Rich*, that he had set him three pieces; that the said *John Oneby* at the same time set the said *John Rich* three half-crowns, which the said *John Rich* won; and immediately the said *John Oneby* in an angry manner turned to the said *William Gower*, and said to him, that it was an impertinent thing to set half-pence; and further said to the said *William Gower* that he the said *William Gower* was an impertinent puppy in so doing; to which the said *William Gower* then and there answered, that whosoever called him so was a rascal; and thereupon the said *John Oneby* took up a glass bottle, and with great force threw it at the said *William Gower*, but the glass bottle did not strike the said *William Gower*, but passing by near his head brushed his peruke, which he then had upon his head, and beat out some of the powder out of his peruke; that thereupon the said *William Gower* immediately after tost a glass or candlestick at the said *John Oneby*, but the glass or candlestick did not hit the said *John Oneby*; upon which both the said *John Oneby* and *William Gower* presently rose from their seats, to fetch their swords, which then hung up in the room; and the said *William Gower* then drew his sword out of the scabbard, but the said *John Oneby* was hindred by others of the company from drawing his sword out of the scabbard, whereupon the said *William Gower* threw away his sword, and by the interposition of the said *John Rich*, *Thomas Hawkins* and *Michael Blunt*, the said *William Gower* and *John Oneby* sat down again, and being so set down continued for the space of an hour in company with the said *John Rich*, *Thomas Hawkins* and *Michael Blunt*; that after the expiration of that hour the said *William Gower* said to the said *John Oneby*, we have had hot words, but you was the aggressor, but I think we may pass it over; and at the same time the said *William Gower* offered his hand to the said *John Oneby*; to which the said *John Oneby* then answered the said *William Gower*, no damn you, I will have your blood; that afterwards the reckoning was paid by the said *John Oneby*, *William Gower*, *John Rich*, *Thomas Hawkins* and *Michael Blunt*; and that the said *William Gower*, *John Rich*, *Thomas Hawkins* and *Michael Blunt* went out of the said room, with an intent to go home, leaving the said *John Oneby* in the room; that the said *John Oneby* so as aforesaid remaining in the room, called to the said *William Gower*, young man come back, I have something to say to you; that thereupon the said *William Gower* returned into the said room and the door of the room was immediately flung to, and shut, by reason of which shutting of the door, all of the said company besides the said *William Gower* and *John Oneby* were shut out of the room; and that then after shutting

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shutting of the door a clashing of swords was heard; then the jury find, that the said *John Oneby* gave the said *William Gower* with his sword the mortal wound in the indictment mentioned, of which he died; but they further find, that at the breaking up of the company the said *John Oneby* had his great coat thrown over his shoulders, and that the said *John Oneby* received three small wounds in the fighting with the said *William Gower*; and that the said *William Gower*, being asked upon his death-bed, whether he the said *William Gower* had received his wounds in a manner among swordsmen called fair, answered, I think I did; and they further find, that from the time the said *Oneby* threw the glass bottle at the said *William Gower*, there was no reconciliation between the said *John Oneby* and *William Gower*: and whether this is murder or manslaughter, the jury pray the advice of the court: and if, &c.

So that the question upon the special verdict is, whether *John Oneby* the prisoner at the bar is guilty of murder or manslaughter.

A great deal of time was spent in drawing up this special verdict; for altho' the trial at the *Old Bailey* was in the beginning of last *March* was twelve months, yet the record was not removed into this court till *Hilary* term last; towards the end of which term it was argued by counsel on both sides, and another argument being desired by the counsel for the prisoner, we thought it proper, to desire the opinion of all the rest of the judges; and for that purpose it was argued before all the judges at *Serjeants Inn hall* in *Chancery Lane* upon the 6th day of *May* last; which was as soon as all the judges could meet by reason of the intervention of the circuits. And after mature consideration had, upon a meeting of them, they *seriatim* gave their opinions; and came to this resolution unanimously, not one of them dissenting, and which I have authority from them to declare, viz. that *John Oneby* the prisoner at the bar, upon the facts found upon special verdict, is guilty of murder.

Without entering into a nice examination of the several definitions or descriptions of murder, as they are found in the old law-books, as *Bracton*, *Briton*, and *Fleta*, where the wickedness of the act is aggravated by the circumstances of secrecy or treachery; murder has been long since settled to be, the voluntary killing a person of malice prepense, and that whether it was done secretly, or publickly. *Staundf. pl. cor.* 18. b. 3 *Inst.* 54.

But then it must be considered, what the word malice in such case imports. In common acceptation malice is took to be a settled anger (which requires some length of time) in one person against another, and a desire of revenge. But in the legal acceptation, it imports a wickedness, which

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includes a circumstance attending an act, that cuts off all excuse. By the 25 H. 8. c. 33. for taking away clergy, it is enacted, that every person, who shall be indicted of the crimes therein mentioned, and thereupon arraigned, and stand mute of malice or of frowardness of mind, shall lose the benefit of his clergy. Now in that place malice can never be understood in the vulgar sense, for the party cannot be thought to stand mute out of a settled anger, or desire of revenge, but only to save himself; and therefore such standing mute, and refusing to submit to the course of justice, is said to be done wickedly, i. e. without any manner of excuse, or out of frowardness of mind.

This malice, an essential ingredient to make the killing a person murder (to use the expressions of lord chief justice *Coke* and lord chief justice *Hale*, whose authority hath established them) must be either implied or express; and says *Hale* in his *Pleas of the Crown* 44. this implied malice is collected, either from the manner of doing, or from the person slain, or the person killing. As to the two last, there is no occasion at present, to take them into consideration.

1. As to the first, viz. from the manner of doing, as *Hale* expresses it, or as *Holt* chief justice, *Kelynge* 126. says, from the nature of the action. 1. Wilfully poisoning any man implies malice. 2. If a man doth an act, that apparently must do harm, with an intent to do harm, and death ensues; it will be murder. As if *A.* runs with a horse used to strike, among a multitude of people, and the horse kills a man; it will be murder, for the law implies malice from the nature of the act. 3. Killing a man without a provocation is murder; as if *A.* meets *B.* in the street, and immediately runs him through with a sword, or knocks out his brains with a hammer, or bottle. And if angry words had passed in that case between *A.* and *B.* yet it would have been murder in *A.* because (a) words are not such a provocation, as will prevent such a homicide from being murder; lord *Morley's* case, *Kelynge* 56. 4. The law will imply malice from the nature of the original action, or first assault, tho' blows pass between the parties, before the stroke is given, which occasions the death. As if upon angry words, or abusive language, between *A.* and *B.* of a sudden, *A.* without any provocation (for angry words or abusive language in such a case is looked on as none) draws his sword immediately, and makes a pass at *B.* or strikes at him with any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill *B.* or do him some great bodily hurt, and then *B.* draws his sword, and mutual passes are made, and *A.* kills *B.* this will be murder; for the act was voluntary, and it appears from the nature of it, that it was done with an intent to do mischief;

(a) R. acc. ante
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chief; and therefore since in all probability it might have occasioned *B*'s death, or done him some great bodily harm, the law implies malice prepenſe; and the reſiſtance or paſſes that were made by *B*. were but in the defence of his perſon, which was violently and cruelly attacked. And this was the reſolution of *Kelynge* chief juſtice, *Twifden*, *Windham*, and *Morton* juſtices, in *Hopkin Hugget's* caſe, *Kelynge* 62. cit. ante 1300. 1302. And though in the principal caſe the eight other judges differed in opinion from the four judges in the kings bench, yet to this opinion of the four the eight judges did agree, as *Kelynge* took it. And this was the true reaſon of *Mawgridge's* caſe, *Kel.* 119. the judgment in which caſe is a great authority in this caſe, that not being ſo ſtrong a caſe as the preſent caſe. It was indeed objected by the counſel for the priſoner at the bar in their arguments in the preſent caſe, 1. That *Mawgridge's* caſe was a ſingle caſe, that the judgment in that caſe had carried murder further than it had ever been carried before. 2. That it was not determined with the unanimous opinion of all the then judges, for one very great judge of the then twelve, viz. lord *Trevor*, differed from the other judges, and held it was only manſlaughter. But upon our meeting to conſider of this preſent caſe, all the judges unanimouſly agreed, that *Mawgridge's* caſe was undoubted law, and that that judgment was a right and juſt judgment; ſo groundleſs was that inſinuation which had been made (for ſuch an inſinuation there was) in *Weſtminſter-hall*, that ſome of the preſent judges were of opinion, that the judgment in *Mawgridge's* caſe was not a legal judgment.

And this is as much as is neceſſary, rather more than is neceſſary, to be ſaid as to implied malice, ſince there will be no occaſion in this caſe to look out for malice implied.

2. Malice expreſs, is a deſign formed of taking away another man's life, or of doing ſome miſchief to another, in the execution of which deſign death enſues. And this holds, where ſuch deſign is not formed againſt any particular perſon; as if *A*. having no particular malice againſt any particular perſon, comes with a general reſolution againſt all oppoſers; if the act be unlawful, and death enſue, it is murder. As if it be to commit a riot, to enter into a park, lord *Dacre's* caſe, *H. P. C.* 47. *Moor* 86. *Sev.* 67. So if *A*. goes with a reſolution to kill the firſt man he meets, and meeting *B*. kills him, it is murder with expreſs malice; yet *A*. had not declared any malice againſt *B*. nor againſt any particular perſon. Much more will it be expreſs malice, when the miſchievous deſign is formed againſt any particular perſon, which may be made evident as well by circumſtances as by the expreſs declarations of the perſon killing. As that he would be revenged of *B*. or that he

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would have his life, or have his blood, and some time after he kills *B.* And that such declarations spoken seriously, or deliberately, or after time for reflection, manifest an express malice, no body can doubt.

Having thus briefly mentioned that known and settled rule, that there must be either malice express or implied, to make murder, and also some instances of what is one and what the other of them; I come to the present case before us.

All the twelve judges were unanimous in opinion, that as the facts are founded in this special verdict, it appears, that the prisoner at the bar had express malice against Mr. *Gower*, when he gave him the mortal wound, of which he died: 1. Mr. *Gower* did nothing that could reasonably raise a passion in Mr. *Oneby*. He gave him no provocation whatsoever, for when Mr. *Gower* set the three halfpence, he set them against Mr. *Rich*, and that in a jocular manner, therefore that was no affront to Mr. *Oneby*. 2. Upon that Mr. *Oneby* turned to Mr. *Gower* in an angry manner, and gave him abusive language, and called him impertinent puppy; the answer of *Gower* was not improper, nor more than what might be expected, that whosoever called him so was a rascal. 3. That as *Oneby* had before began with *Gower*, by giving him abusive language, so he then took up the glass bottle, *et magna cum vi* threw it at *Gower*, and beat the powder out of his peruke; if it had killed *G.* it had been certainly murder; upon which *Gower* tossed a glass or candlestick at *Oneby*. And the difference of the finding in the special verdict is observable, *Oneby* threw the bottle at *G. magna cum vi*; *Gower* only tossed the glass or candlestick at *Oneby*. 4. When they fetched their swords, *Gower* did it only to defend himself; for the verdict finds, that though *G.* drew his sword first, yet the prisoner at the bar being hindered by the company from drawing his sword, *Gower* thereupon threw his sword away. 5. By the interposition of the company the prisoner at the bar and Mr. *Gower* sat down again, and continued in company for an hour, after which Mr. *Gower* said, we have had hot words, but you was the aggressor, but I think we may pass it over, and offered his hand to the prisoner; that the prisoner at the bar was the aggressor is true, and that in a violent manner; this was sufficient, to have appeased Mr. *Oneby*, but what is his answer? no, damn you, I will have your blood. There is an express declaration of malice, an express declaration of a design of taking away Mr. *Gower's* life. These words are incapable of any other construction. These words shew his malicious intent, even in throwing the bottle at first; they are spoken an hour after the first action; and are spoken with deliberation. The next fact

the jury find is, that afterwards (not particularly finding what interval of time passed between the speaking these words, and what is found next) that Mr. *Gower*, *Rich*, *Hawkins*, and *Blunt* went out of the room, with an intent to go home, leaving the prisoner at the bar in the room; that the prisoner remaining in the room, called to the said *William Gower*, saying, young man come back, I have something to say to you. These words also shew a plain deliberation, and being attended with the circumstances found before, and what follows immediately, import contempt, young man, come back, are insolent and imperious, and import a resentment he had conceived against Mr. *Gower*, about which he had something to say to him. For what purpose did the prisoner stay, after all the company had left the room, to go home? it was to say something to Mr. *Gower*. What is that? Why as soon as Mr. *Gower* is returned into the room, the door was immediately flung to, and shut; and the rest of the company shut out; and then after shutting the door, a clashing of swords was heard, and the prisoner gave Mr. *Gower* the mortal wound of which he died.

These immediate subsequent facts shew, what it was the prisoner had to say to Mr. *Gower*; it was to carry the malicious design, he had before declared he had against Mr. *Gower*, into execution, viz. to have his blood; and he had it, for he gave him the wound of which he died.

To go farther; if the prisoner had malice against Mr. *Gower*, though they fought after the door was shut, the interchange of blows will make no difference; for if *A.* has malice against *B.* and meets *B.* and strikes him, *B.* draws, *A.* flies to the wall, *A.* kills *B.* it is murder. *H. P. C.* 42. *Kelynge* 58.

Nay, if the case had been, that there had been mutual malice between the prisoner and Mr. *Gower* (which does not appear to have been on the part of the deceased) and they had met and fought upon that malice; the killing Mr. *G.* by the prisoner had been murder. *H. P. C.* 47. 1 *Bulstr.* 86, 87. *Hob.* 121. *Crompt.* 21.

The judges were all of opinion upon the facts found in this verdict, there appeared to be express malice in *Oneby* against Mr. *Gower*, and then *Oneby* killing *Gower*, having such express malice against him, they were all unanimous and clear of opinion, that this was plainly murder.

Having thus mentioned the reasons, upon which we ground this present resolution; I shall next consider, if any of the objections made by the counsel for the prisoner are
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an answer to these reasons, or take off the force of them.

The counsel for the prisoner Mr. *Oneby* insisted, that upon the whole verdict the case was no more, than that from a slight occasion passionate words arose, mutual reproaches passed, the quarrel was sudden, mutual assaults were made, and on a sudden fighting in heat of passion the prisoner killed the deceased; which can be no more than manslaughter.

That such fact could amount to no more than manslaughter, they cited the known case, that if *A.* and *B.* fall out upon a sudden, and they presently agree to fight, and each fetches his weapon, and go into the field, and fight, and one of them kills the other; this is but manslaughter, *H. P. C.* 48. 3 *Inst.* 57. because the passion was never cooled.

In this case (said they) it is plain, the quarrel arose on a sudden; Mr. *Oneby's* passion was raised, and that is not found by the jury to have ever been cooled, and therefore the words Mr. *Oneby* spoke, no, damn you, I will have your blood, &c. were only words of heat spoke under the continuance of the first passion. And they further insisted, that the law had fixed no time, in which the passion must be took to be cooled; but that depends upon circumstances, of which the jury are the proper judges. In this case the whole time that passed between the quarrel and giving the mortal wound, was but little more than an hour; and it has been adjudged, that the passion shall not be took to be cooled in very near that time in 12 *Co.* 87. *Cro. Jac.* 296. *H. P. C.* 48. *Rowley's* case, where the child of *A.* beat the child of *B.* *B's* child all bloody ran home to his father; *B.* the father ran three quarters of a mile, and beat the child of *A.* by means whereof he died; this was adjudged to be only manslaughter; yet there must have been a considerable time after *B.* was provoked by the usage of his child, before he killed *A's* child, because he ran three quarters of a mile; yet it being one continued passion raised in *B.* upon the beating of his child, it was held this was only manslaughter. And in this present case, to shew the passion of Mr. *Oneby*, which was suddenly raised, was not cooled; the counsel for Mr. *Oneby* observed, that the jury had expressly found, that there was no reconciliation between *Oneby* the prisoner and Mr. *Gower* the deceased, from the time Mr. *Oneby* first threw the bottle.

This I take to be the chief objection, upon which the counsel for the prisoner principally relied.

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In answer to this objection I must first take notice, that where a man is killed, the law will not presume, that it was upon a sudden quarrel, unless it is proved so to be; and therefore] in *Legg's case*, *Kelynge* 27. it was agreed upon evidence, that if *A.* kills *B.* and no sudden quarrel appears, it is murder, for it lies upon the party indicted, to prove the sudden quarrel.

In the next place, from what I have said before it appears, that though a quarrel was sudden, and mutual fighting before the mortal wound given; it is by no means to be took as a general rule, that the killing a man will be only manslaughter. It is true, if reproachful language passes between *A.* and *B.* and *A.* bids *B.* draw, and they both draw, (it is not material which of them draws first) and they both fight, and mutual passes are made; death ensuing from thence (*a*) will be only manslaughter, because it was of a sudden, and each ran the hazard of his life. But there is a wide difference between that case, and where upon words *A.* draws his sword, and makes a pass at *B.* or with some dangerous weapon attacks him, and then *B.* draws, and they fight, and *A.* kills *B.* there though there was a quarrel upon abusive language, and there was afterwards a mutual fighting, yet since *A.* attacked *B.* with a weapon or instrument, which might have taken away *B.*'s life, though they fought afterwards, that will be murder. And this was agreed by all the judges in the present case.

(a) Vide Fort.
295.

But for argument's sake, and it is only for argument's sake, and to give the objection made by the counsel for the prisoner it's full force; If it should be looked on here, that what is found in the former part of the verdict was upon a sudden quarrel, and only the effect of passion; yet if it appears upon the special verdict, that there was sufficient time for this passion to cool, and for reason to get the better of the transport of passion, and the subsequent acts were deliberate, before the mortal wound given; the killing of the deceased will be murder.

And all the judges were of opinion, that upon consideration of the facts found, it appeared, there had been sufficient time for Mr. *Oneby's* transport of passion to cool, and that he had deliberated, and that the killing of Mr. *Gower* was a deliberate act, and the result of malice Mr. *Oneby* had conceived against the deceased.

But before I mention their reasons, I must lay down this proposition, which they all agreed, viz. that the court are judges of the malice, and not the jury; and that the court are also judges upon the facts found by the jury, whether, if the quarrel was sudden, there was time for the

the passion to cool; or whether the act was deliberate or not?

Upon the trial of the indictment the judge directs the jury thus, If you believe such and such witnesses, who have sworn such and such facts, the killing the deceased was with malice prepense expresse, or it was with malice implied, and then you ought to find the prisoner guilty of murder; but if you do not believe those witnesses, then you ought to find him guilty of manslaughter only: and so according to the nature of the case, if you believe such and such facts, the act was deliberate, or not deliberate; and then you ought to find so and so. And the jury may, if they think proper, give a general verdict, either that the prisoner is guilty of murder, or of manslaughter. But if they decline giving a general verdict, and will find the facts specially, the court is to form their judgment from the facts found, whether there was malice or not, or whether the fact was done on a sudden transport of passion, or was an act of deliberation or not.

Although there are many special verdicts in indictments for murder, there never was one, where the jury find in expresse terms, that the act was done with malice, or was not done with malice prepense, or that it was done upon a sudden quarrel and in transport of passion, or that the passion was cooled, or not cooled, or that the act was deliberate, or not deliberate; but the collection of those things from the facts found is left to the judgment of the court. *Holloway's case*, Palm. 545. *Cro. Car.* 131. *W. Jones* 198. So in the case cited by the counsel for the prisoner, *Cro. Jac.* 266. *Rowley's case*, the jury find the fact, but don't find in expresse terms, that the father, whose child was beat, killed the other child in a sudden heat of passion; but that was left to the judgment of the court, upon the particular facts found.

But then it is objected, that the law has fixed no time in which the passion must be supposed to be cooled. 'Tis very true, it has not, nor could it, because passions in some persons are stronger and their judgments weaker than in others; and by consequence it will require a longer time in some, for reason to get the better of their passions, than in others; but that must depend upon the facts, which shew whether the person has deliberated or not; for acts of deliberation will make it appear, whether that violent transport of passion was cooled or no.

But thus far the resolutions of the judges have already gone, and it has been adjudged, that if two fall out upon a sudden, and they appoint to fight next day, that the passion by that time

must be looked on to be cooled ; and in such case, if they meet next day, and fight, and the one kills the other at that meeting, it has been often held to be murder. *Hale P. C.* 48.

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To go a little further : if two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain ; this is murder ; for there was time to allay the heat, and their meeting is of malice. So is *Legg's* case, *Kelyng* 27.

At the meeting of all the judges before lord *Morley's* trial by the peers for the murder of one *Hastings*, they all agreed, that if upon words two men grow to anger, and afterwards they suppress that anger, and then fall into other discourse, or have other diversions, for such a reasonable space of time as in reasonable intendment their heat might be cooled, and some time after they draw upon one another, and fight, and one of them is killed ; this is murder, because being attended with such circumstances, it is reasonably supposed to be a deliberate act, and a premeditated revenge upon the first quarrel. But the circumstances of such an act being matter of fact, the jury are judges of them, *Kelyng* 56. The meaning of which last words is, that the jury are judges of the facts, from which those circumstances are collected. But as I said before, when those facts are found, the court is to judge from them, whether they do not shew the act was deliberate or not.

Lord *Morley* upon his trial by the peers was acquitted ; and after that in *Easter* term 18 *Car.* 2. *Broomwich*, who was indicted as a principal, in being present, aiding and abetting lord *Morley* in the murder of *Hastings*, was tried at the king's bench bar. The quarrel was at a tavern ; but it was proved, when the quarrel was at the tavern, that lord *Morley* said, if we fight at this time, I shall have a disadvantage, by reason of the height of my shoes ; and presently after they went into the fields and fought, lord *Morley* killed *Hastings* ; but while they were fighting, *Broomwich* made a thrust at *Hastings*, and lord *Morley* closed in with *Hastings*, and killed him ; and (says the book) this was held as clear evidence of their intention to fight, when they went out of the tavern ; and the quarrel being only about words, and fighting in a little time after, it was held murder by all the court. And there need not be a night's time between the quarrel and the fighting, to make it murder, but such time only as it may appear not to be done on the first passion ; for lord *Morley* considered the disadvantage of his shoes : and the court directed the jury, that it was murder in *Broomwich*, being present and aiding ; but the jury acquitted him. 1 *Sid.* 277. reports the same case, and says, that the court in the direction to the

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the jury laid it down, that after the provocation in the house, they say, this is no convenient place (and so have reason, to judge of conveniency) and appoint another place, though the fight is to be presently; this is murder, for the circumstances shew their temper.

In *H. P. C.* 48. if *A.* and *B.* fall out, *A.* says he will not strike, but will give *B.* a pot of ale to touch him, *B.* strikes, *A.* kills him; murder.

Two quarrel; the one says, if you'll go into the field I will break your head, and there one kills the other; murder. *Crompt.* 25. p. 49.

Two fall out on a sudden in the town, and they by agreement go into the field presently, and one kills the other; murder. *Crompt.* 23. fol. 31.

From these cases it appears, that though the law of *England* is so far peculiarly favourable (I use the word peculiarly, because I know no other law that makes such a distinction between murder and manslaughter) as to permit the excess of anger and passion (which a man ought to keep under and govern) in some instances to extenuate the greatest of private injuries, as the taking away a man's life is; yet in those cases it must be such a passion, as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office; if it appears he reflects, deliberates, and considers before he gives the fatal stroke, which cannot be as long as the fury of passion continues, the law will no longer under that pretext of passion exempt him from the punishment, which from the greatness of the injury and heinousness of the crime he justly deserves, so as to lessen it from murder to manslaughter. Let us see therefore, whether upon this special verdict it appears, that the fighting and killing Mr. *Gower* was only done in heat of passion, or was a deliberate act. By what I observed before, it plainly appears, it was a deliberate act. But to recapitulate in short: after the words had passed, and the bottle was thrown by the prisoner, and swords drawn; by the interposition of friends they sat down, and continued in company for an hour (a reasonable time under those circumstances for the passion to cool,) and after that hour expired, the deceased says, we have had hot words, but you was the aggressor, but I think we may pass it over, and at the same time offered his hand to the prisoner, which was enough to have appeased the prisoner; to this Mr. *Oneby* answered, no damn you, I'll have your blood, words expressing malice, not passion: then when the company went out of the room, the prisoner staid, and called the deceased back; Young man, come back, I have something to say to you; the

the door was immediately shut, clashing of swords was heard, and the deceased received the mortal wound from the prisoner at the bar. The prisoner's words shew what was his intention, viz. to take away Mr. Gower's life; and the killing him may properly be said to have been done upon deliberation and consideration.

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The counsel for the prisoner in their arguments insisted, that there were several circumstances found in the special verdict in favour of the prisoner, which were a foundation for the court, to construe the other expressions to be only words of heat, and that what he did was in the heat of his first passion, which was never cooled, and not out of malice. As, 1. It is found, that at the breaking up of the company Mr. Oneby had his great coat thrown over his shoulders, from whence it would be a strain to think he then intended to fight with Mr. Gower. 2. It might be Mr. Gower who shut the door, who came back after he was out of the room, the jury not having found who shut the door. 3. That it was found, there was no reconciliation between them, from the throwing the bottle at Mr. Gower. But as to the first of these objections, considering the words the prisoner used after this, and after the deceased was out of the room, and what followed; since the jury have found this fact, without saying any more about it, the natural construction is, that this was only used by the prisoner as a blind to the company, to conceal from them his real intention, till they were gone out of the room. As to the second, it stands uncertain upon the verdict, but it is an uncertainty which can have no influence upon the present determination; for if Mr. Gower had shut the door, that would not alone have materially altered the case. As to the third, since express malice before appeared to be in the prisoner, the finding that fact does not import, that the first heat of passion continued only, but that the malice continued.

The counsel for Mr. Oneby farther objected, that it appeared, there was a mutual fighting after the door was shut; for it is found, that he received three slight wounds; then it is not found, who drew first, or made the first assault after the door was shut; and it was possible, a new sudden quarrel might then arise, in which Mr. Gower might be the aggressor; and therefore the special verdict was uncertain in a material point. The answer to which is, what is said in *Legg's case*, *Kelyn*. 27. cited before; that if A. kills B. and no sudden quarrel appears, it is murder; for it lies on the party indicted, to prove the sudden quarrel; and therefore the jury not having found any such thing for the prisoner's benefit, it is to be took, there was no such. This is said, supposing the latter part of the verdict could be considered,

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considered, without regarding the former part of it; and that when the company went out of the room, the prisoner and Mr. *Gower* were reconciled. But however that might have done, here it appears there was no reconciliation, and therefore there can be no imagination of a new original quarrel in the room, after the door was shut. And as to the slight wounds the prisoner received, that is immaterial, for he having malice against Mr. *Gower*, though there was a mutual fighting, and the prisoner was wounded, yet when he killed Mr. *Gower* it will be murder.

The last fact in the special verdict, which they relied on was, when Mr. *Gower* was asked upon his death-bed, whether he had received his wounds in a manner among swordsmen called fair, he answered I think I did; whereby the deceased shewed, he was satisfied the act was fair. The answer to which is plain, that if *A.* having malice against *B.* and they meet and fight, though the fight is never so fair according to the laws of arms, yet if *A.* kills *B.* it will be murder.

The cases the counsel for the prisoner principally relied on to make this fact only manslaughter, were *Rowley's case*, 12 Co. 87. and *Turner's case*, *Comberbatch* 407, 8.

(a) Vide Fort.
394.

As to 12 Co. 17. the case was, that two boys fighting together, the one of them was scratched in the face, and he bled a great deal at the nose, and so he run three quarters of a mile to his father, who seeing him very bloody, took in his hand a cudgel, and went three quarters of a mile to the other boy, and struck him upon the head, upon which he died; and it was held but manslaughter, for (a) the passion of the father continued. And there is no time, that the law can determine, that it was so settled, that it should be adjudged malice prepense.

To which the answer is plain for the reason given in *Cra. Jac.* 269. which is the same case, that the father having no anger, before, but being provoked upon the complaint and sight of his son's blood, and in that anger beating him, of which he died; the law adjudged it to be upon that sudden passion. But that is, considering what has been said before, clearly distinguishable from the present case; besides it may be added, it was but a little cudgel he struck with, from which no such fatal event could be reasonably expected.

Turner's case was this; his wife complained, the boy had not cleaned her clogs, upon which Mr. *Turner* took up a clog and struck him on the head, and killed him; and though there was no other provocation it was only held manslaughter. But

But the reason of that was, because the clog was so small, there could be no design to do any great harm to the boy, much less to kill him; and a master may correct a servant in a reasonable manner for a fault. And lord chief justice Holt, in *Comberbatch* 408. says, that in that case it was an unlikely thing, meaning that the clog should kill the boy. The counsel for the prisoner being apprehensive of the authority of *Maugridge's* case, *Kelyng* 119. besides the observations they had made, mentioned before, to induce the court to look upon that judgment as not warranted by law; endeavoured to distinguish the present case from it, supposing it to be law. And 1st, they said, that in *Maugridge's* case the bottle hit Mr. *Cope* and stunned him; but here the bottle did not hit Mr. *Gower*, but only brushed some powder out of his peruke. 2dly, In *Maugridge's* case the bottle was full of wine; here it is not found to have been so, and therefore must be took to have been empty; and the size of the bottle does not appear, it might be very small. 3dly, *Maugridge* drew his sword immediately after throwing the bottle without intermission; here Mr. *Gower's* sword was first drawn. 4thly, Mr. *Cope* never drew; here Mr. *Gower* not only drew the first, but clashing of swords were heard, so there must have been fighting.

It is very true (so far as those facts will make a difference) this present case is distinguishable from *Maugridge's* case; for that case was determined only upon an implied malice (but as I said before, was very rightly and justly determined, as we all agreed;) for strictly and properly speaking, although the words express malice is mentioned in the reasons given for that resolution, yet it was but malice implied. But still this way of distinguishing the present case from *Maugridge's* will be of no service to the prisoner; because though all the judges held, this case was distinguishable from *Maugridge's* case, it was in respect that this was a much stronger case as to the murder, the jury having found facts which shew Mr. *Onby* had an express malice against Mr. *Gower*. Upon the whole matter this court, with the concurrent opinion of all the other judges, is of opinion, that the prisoner at the bar *John Onby*, by this special verdict is found guilty of murder.

The prisoner being, after this resolution pronounced, intitled by the course of the court to have four days to move in arrest of judgment, he was sent back to *Newgate*, and a rule for bringing him up to receive judgment the end of the week, was made; before which time an account came of the death of his late majesty at *Osnaburg* the 11th of June. And afterwards at the time appointed by the rule he was brought to the bar, and judgment was pronounced against him, and execution awarded. After which a pre ty strong

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considered, without regarding the former part of it; and that when the company went out of the room, the prisoner and Mr. Gower were reconciled. But however that might have done, here it appears there was no reconciliation, and therefore there can be no imagination of a new original quarrel in the room, after the door was shut. And as to the slight wounds the prisoner received, that is immaterial, for he having malice against Mr. Gower, though there was a mutual fighting, and the prisoner was wounded, yet when he killed Mr. Gower it will be murder.

The last fact in the special verdict, which they relied on was, when Mr. Gower was asked upon his death-bed, whether he had received his wounds in a manner among swordsmen called fair, he answered I think I did; whereby the deceased shewed, he was satisfied the act was fair. The answer to which is plain, that if *A.* having malice against *B.* and they meet and fight, though the fight is never so fair according to the laws of arms, yet if *A.* kills *B.* it will be murder.

The cases the counsel for the prisoner principally relied on to make this fact only manslaughter, were *Rowley's case*, 12 Co. 87. and *Turner's case*, *Comberbatch* 407, 8.

(a) Vide Fort.
394.

As to 12 Co. 17. the case was, that two boys fighting together, the one of them was scratched in the face, and he bled a great deal at the nose, and so he run three quarters of a mile to his father, who seeing him very bloody, took in his hand a cudgel, and went three quarters of a mile to the other boy, and struck him upon the head, upon which he died; and it was held but manslaughter, for (a) the passion of the father continued. And there is no time, that the law can determine, that it was so settled, that it should be adjudged malice prepense.

To which the answer is plain for the reason given in *Cra. Jac.* 269. which is the same case, that the father having no anger, before, but being provoked upon the complaint and sight of his son's blood, and in that anger beating him, of which he died; the law adjudged it to be upon that sudden passion. But that is, considering what has been said before, clearly distinguishable from the present case; besides it may be added, it was but a little cudgel he struck with, from which no such fatal event could be reasonably expected.

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application was made to his majesty king *George* the second for a reprieve; but he was pleased to declare, that the judges having adjudged the prisoner guilty of murder, the law should take its course. In which attempt the prisoner not succeeding, he killed himself in *Newgate* in the night before the day appointed for his execution, by cutting through the great artery in his arm with a razor, by which he bled to death.

Memorandum, As soon as I had delivered this resolution, I desired my brothers *Fortescue*, *Reynolds* and *Probyn*, that if they disapproved any thing I have laid down, they would express their disapprobation; but they publicly declared, they concurred in *omnibus*.

Thomas Warren *vers.* Matthew Confett.

Intr. Hil. 7
Geo. C. B. Rot.
1556. and Hil.
3 Geo. B. R.
Rot. 47.

S. C. Str. 778. and rather incorrectly 1 Barnard. B. R. 15.

If an action of
debt is founded
upon a specialty,
the defendant
cannot plead
nil debet to it.
Semb. R. acc.
Burr. 2586.
Bl. 683. Salk.
565. pl. 1.

alibi the plain-
tiff may be bound
to state in his
declaration other
facts to support
his demand.
Semb. acc. Burr.
2586. Bl. 683.
Salk. 565. pl. 1.

ERROR on a judgment given in the common pleas in an action of debt for 2800*l.* brought by *Confett* against *Warren*, upon a covenant to pay that sum in case the plaintiff and defendant did not perform the covenants in an indenture for the transfer of and payment for shares in the *Welsh* copper company; in which the plaintiff below *Matthew Confett* declared, that the 10th of *Aug.* 1720, by a certain indenture made between the plaintiff and defendant (one part of which sealed by the said *Warren* the plaintiff *Confett* produced in court) the said *Confett* for the considerations in the said indenture mentioned for himself, &c. covenanted and agreed with the said *Warren*, &c. that upon payment to him, &c. of 1400*l.* he, &c. would transfer to the said *Warren* twenty-five shares in the stock of the governor and company of the copper miners in *Wales*, when and as soon as the transfer book of the said governor and company should be open, &c. and that the said *Warren* covenanted with the said *Confett* by the said indenture, that he, &c. would not only accept the said twenty-five shares, but would upon transfer thereof pay to the said *Confett*, &c. the said sum of 1400*l.* in full for the purchase of the premises; and for the performance of the covenants, payment and agreements aforesaid, on the part and behalf of the said respective parties, &c. each obliged himself, his heirs, &c. to the other of them, &c. in the penal sum of 2800*l.* by the said indenture; and the plaintiff below *Matthew Confett* in fact says, that after making the said indenture, viz. 29th of *August* 1720, the said transfer book of the said governor and company first opened after the making the said inden-

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ture, and that he the said *Matthew Consett* did in due form of law transfer the said twenty-five shares to the said *Thomas Warren*, of which he had notice; but the said defendant *Thomas Warren* refused to accept the said transfer, and has not paid the said 1400*l.* to the said *Consett*; *per quod actio accrevit* to the said *Consett* to demand and have of the said *Thomas Warren* the said 2800*l.* To which the defendant *Warren* pleaded, *quod ipse non debet praedicto Matthæo Consett praedictas 2800*l.* nec aliquem inde denarium, &c. et de hoc ponit se super patriam.* To this *Consett* the plaintiff below demurred, and shewed for cause, *quod praedictus* the defendant *Warren non respondit materiae pro infractione conventionis assignatae, sed placitavit generale placitum in hujusmodi casu non admissibile, &c.* The defendant joined in demurrer and in the common pleas judgment was given for the plaintiff *Consett*. Upon which judgment *Warren* brought this writ of error. And it was argued for the plaintiff in error by Mr. *Reeve*, and by Mr. serjeant *Darnall* for the defendant in error, in Mich. term, 11 Geo. 1724. And it was argued in this Trin. term by Mr. *Fazakerley* for the plaintiff in error, and by Mr. serjeant *Chapple* for the defendant in error. And the single question that was made was, whether *nil debet* is a good plea to debt brought for the penalty upon these articles? And it was insisted upon by Mr. *Reeve* and Mr. *Fazakerley*, that it was a good plea, and that therefore judgment ought to have been given for the defendant by the court of common pleas.

The counsel for the plaintiff in error agreed, that where debt is brought upon a judgment, or upon a single bill, the defendant cannot plead *nil debet*; because by the judgment or single bond the defendant does appear to be indebted, and the discharge must be by matter of as high a nature. So in debt upon a bond with condition for payment, *nil debet* is no plea; for the plaintiff declares only upon the bond, and the defendant must pray *oyer* of the bond and condition, or if the bond is defeasanced by a distinct deed he must plead that defeasance, and shew he has performed the condition of the bond, or the agreement in the defeasance. But here it was not enough for the plaintiff to set out the articles, but it was absolutely necessary for him to aver the facts, to intitle him to the action, as that he had transferred, and that the defendant had not accepted the twenty-five shares and paid the 1400*l.* so that his action is not barely founded on the articles, but on the defendant's not performing the facts in the articles; and in such case the defendant is not estopped, to say he owes nothing, because the cause of action arises from fact, and not merely from the deed. And therefore in debt for rent upon lease by indenture, the defendant may plead payment, or waived by distress, *et sic nil debet*. Every day's experience shews, that a (a) general *nil debet* is a good plea to debt for

rent upon a lease by indenture. Where matter of fact is mingled with record, it (a) is triable *per pais*. *Hob. 244. Peter v. Stafford*. And in such case *nil debet* is a good plea, as in debt for taking scavage *contra formam statuti*. 21 H. 7. 14. *Br. Issue join 23*. So in any action of debt upon a statute, because the action is grounded on the fact as well as on the statute. In debt for an escape of a person took in execution upon a judgment by *capias ad satisfaciendum*, *nil debet* is a good plea. 1 *Saund. 38. Jones v. Pope*; yet such action of debt is not barred by the statute of limitations. So in debt for tithes, yet those actions are grounded upon statutes *Cro. Car. 513. Tallery v. Jackson*. So in debt upon a judgment recovered against an administrator upon suggesting a *devastavit*, the defendant may plead *nil debet*; and so Mr. *Reeve* said it was held by lord chief justice *Holt* in the case of *Berwick v. Andrews, Mich. 2 Ann.* And yet to debt upon a judgment *nil debet* is no plea. Therefore they concluded, that in this case the action of debt not being barely founded upon the articles, but upon the fact also (in not accepting the shares, and in not paying the 1400*l.*) *nil debet* was a good plea; and the judgment given in the common pleas for the plaintiff there was erroneous, and ought to be reversed.

On the other side it was argued by Mr. serjeant *Darnell* and Mr. serjeant *Chapple*, that the plea was an ill plea, and that judgment ought to be affirmed. They admitted, that in debt for rent (though reserved by indenture) or for an escape, or upon a statute, *nil debet* would be a good plea; because the foundation of the action is a mere fact, as the arrears of rent, the escape, or the doing the act prohibited by the statute. So on the other hand, where the action is grounded upon a record, or specialty, *nil debet* is no plea. 3 *Lev. 170. Tyndal v. Hutchinson*. Covenant upon an indenture of lease, and breach was assigned in non-payment of rent according to the covenant in the indenture; the plaintiff demurred generally, and adjudged *per totam curiam*, that *nil debet* is no plea in this case upon the indenture. [But (b) that was a plea of *nil debet* to a breach in an action of covenant.] But as to the present case they said, there had been many actions of the very like nature as this brought of late years, and it never had been before attempted, to plead such a plea; and if it should be admitted, it would put plaintiffs under insuperable difficulties, and to great and unnecessary expences. For they must bring witnesses, to prove the execution of the deed or articles, that the contract was registered, when the books first opened, that he tendered the stock, &c. On the other hand, the defendant cannot be prejudiced by confining him, as hitherto has been practised, to answer the facts in the declaration, or deny the deed if he will, and to plead the contract was not registered, &c. And by

(b) Vide Cowp.
589. 2 Keb.

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leave of the court he may have liberty to plead more than one of these things, whereby he will be secure of relying upon all proper defences, and the plaintiff will by the plea have pointed out to him what will be necessary for him, to come prepared at the trial to prove. But they principally relied on the case of *Smith v. Whitehead*, said by them to be adjudged Trin. 9 Geo. B. R. that in debt brought by the plaintiff as assignee of the sheriff upon a bail-bond, (a) *nil debet* was no good plea; which comes up to this case, because the defendant is not concluded by the assignment of the sheriff, being as to him a stranger, but as a matter of fact, as also the arrest, &c. which *Fortescue* justice said was so adjudged. And it was adjudged Pasch. 10 Geo. between Sir John Williams et al v. Webb. in this court, that in an action of debt brought by assignees of commissioners of bankrupts, *nil debet* was held an ill plea. Therefore they concluded this plea was ill, and judgment ought to be affirmed.

(a) Acc. Burr.
2586. Bl. 683.

And of that opinion was the whole court. For there is a difference, where the specialty is but an inducement to the action, and matter of fact is the foundation of it, there *nil debet* will be a good plea; as in debt for rent by indenture, the plaintiff need not set out the indenture; so in debt for the escape, or on a *devastavit* against an executor, the judgment is but inducement, and (b) the escape and *devastavit* are the foundations of the action: but where the deed is the foundation, and the fact is but inducement; *nil debet* is no plea, as in this case, the articles are the foundation of the action; and therefore they held, *nil debet* was no good plea, because it would make the jury judges of the validity of the deed. Besides, this having been never attempted before, where there have been abundance of actions of this nature, is a strong argument, that it was generally taken, this plea could not be pleaded; which otherwise the counsel for the defendants would certainly have advised their clients to have pleaded, since it would have been of so great advantage to them, and have put the plaintiffs under very great difficulties. And the chief justice *Raymond* and justice *Reynolds* relied much upon the authority of the case of *Smith v. Whitehead*, which they took to be a very apposite case. Judgment was affirmed. Tuesday June 6th, 1727. See *Hardr.* 332.

(b) Vide ante
35.

Intr. Trin. 12
Geo. Rot. 529.
et Intr. Pasch.
13 Geo. B. R.
Rot.

Thomas and John Blake *vers.* John Dodemead
and Sarah his wife, late Sarah Astrill.

S. C. Str. 775, and with some little difference 1 Barn. B. R. 16.

On a scire facias
by baron and
feme upon a
judgment reco-
vered by the feme
dum sola, the
plaintiffs need
not allege by
way of venue
where they
married.

Upon a scire
facias, if the
defendant de-
murs alleging
that the declara-
tion is insuffi-
cient, a joinder
stating that the
writ of scire
facias is suffi-
cient does not
occasion a dis-
continuance.

ERROR upon a judgment given in the common pleas against John and Thomas Blake in a scire facias brought there by Dodemead and his wife, which set out, that the said Sarah, dum sola, recovered against the Blakes 600 l. debt, and 20 l. costs, *executio tamen judicii praedicti adhuc restat facienda, ac praedicta Sara post redditionem judicii praedicti cepit in virum praedictum Johannem Dodemead, &c.* the defendants *veniunt et defendunt vim et injuriam quando, &c. et prius judicium de narratione praedicta, quia dicunt, quod narratio praedicta materiaque in eadem contenta minus sufficientia in lege existunt, &c.* and so demur, and shew for cause, that the plaintiffs Dodemead et uxor non ostendunt curiae hic diem nec locum in quibus dicta Sara cepit praedictum Johannem D. in virum suum, &c. Et praedicti Johannes D. et Sara dicunt, quod ipsi per aliqua praerogativa ab executione sua de debito et dampnis praedictis versus praefatum T. B. et J. B. habenda praecius non debent, quia dicunt, quod breve de scire facias praedictum materiaque in eodem contenta bona et sufficientia in lege existunt ad ipsos J. D. et S. executionem suam praedictam versus praedictos T. B. et J. B. manutenendum, &c. And judgment was given in the common pleas for the plaintiffs Dodemead and his wife. Upon which a writ of error being brought, it was argued by serjeant Hawkins and Mr. Lee for the plaintiffs in error, that the writ was ill, because no place was alleged, where the plaintiffs in the original action were married. For where a thing is alleged as a fact, and is material, it is traversable, and in such case it is necessary to allege a place where it was done. Now here Sarah's taking Dodemead for her husband is a material fact to intitle them to this scire facias upon that judgment recovered against the defendants by Sara dum sola; and therefore a place ought to be alleged, where she took him for her husband. 35 H. 6. 50. In debt brought by A. against B. A. declared that B. granted to the plaintiff A. an annuity, till A. was promoted to a competent benefice; and shewed, that he, viz. A. such a time took a wife, and that the annuity was in arrear before he took this wife, amounting to the sum demanded: and the declaration was adjudged to be naught, because the plaintiff had not alleged a place, where he took his wife. Owen 23. Lord Dacre's case. In debt upon an account taken before auditors assigned, the declara-

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tion did not allege a place where the auditors were assigned. *Moore* 527. *Mathuris v. Westray*, in covenant against a lessee by assignee of the reversion of the term for years (out of which the defendant's lease was derived) the defendant pleaded, he had assigned his term before the grant to the plaintiff, and held ill; because he did not allege a place where he assigned the term. And *Hob.* 233. when a material fact and traversable is alledged, a place must be laid, where it was done. And 2 *Lev.* 227. *Chapman v. Fothergill*. And in a *scire facias* as here, the party intitled to the benefit of the judgment marries, a place where the marriage was, is alledged. *Co. Intr.* 623. *Thesaurus Brevium* 118, 119. This might be good after a verdict, but in this case there is a special demurrer, and this defect shewn for cause. 2. It was urged for the plaintiff in error, that he had demurred in the common pleas to the declaration, whereas there was no declaration, but only the writ of *scire facias*; and the plaintiff below had joined in demurrer in maintenance of his writ; and therefore this was a discontinuance.

But it was argued by Mr. Reeve and Mr. Strange *e contra* for the defendants in error, that the judgment was well given. And they insisted, this was only a surmise relating to the person of the plaintiff, and was but in nature of an exception in abatement; and that as to matters which go in abatement of a writ only, it is not necessary to lay a *venue*. *Lett v. Mills*, ante 1014. The defendant pleaded, *quod suscepit ordinem militarem et jam miles existit*; and it was held, there need be no *venue*, where he was knighted; for any thing that concerns the person shall be tried where the action is laid. *West v. Sutton* ante 853. And they said, that the precedents in the common pleas were generally as this is. In *Officina Brevium* 259, & 283. there are two *scire facias*'s just as this, in the like case. 2. As to the other objection, they said this could be no discontinuance, for though the plaintiff in error demurred in the common pleas wrong, yet the plaintiff below has not joined in that, but has made his demurrer proper and right. And therefore they prayed, the judgment might be affirmed. And June the 6th, upon the authority of several precedents cited, and for the said reasons given by the counsel for the defendant in error, judgment was affirmed. And this does not clash with any of the cases cited on the plaintiff in error's behalf; because those were of material facts, which went to the point of the action, and did not barely go to the person or point of the writ, and therefore a *venue* ought to be laid as to them.

The King against Thomas Betts.

S. C. with some difference, 1 Sess. Caf. 352.

THE defendant was committed by the commissioners for licensing hackney coaches, upon an information exhibited before them by one *Timothy Bower* the informer against the defendant, for that the defendant the 14th of *July 12 Geo.* presumed to stand and ply with a coach and horses for hire at *Whitechapel bars* in the open street, within the weekly bills of mortality, and then and there drove his coach with horses for hire from thence to places within the weekly bills of mortality, *contra formam statuti*, not being a person licensed pursuant to the act of parliament; and the commissioners gave judgment against him, that he should forfeit 5 *l. &c.*

This information was grounded upon 1 *G. c.* 57. *f.* 3. whereby it is enacted, that from and after the 24th of *June 1715*, no person or persons shall presume to stand, ply, or drive for hire with any coach whatsoever, hearse, or coach-horses, or shall let to hire any mourning coach or coach-horses to attend or wait on any funeral, within the cities of *London and Westminster*, or suburbs of the same, or within the parishes or places within the weekly bills of mortality, except such as shall be licensed, &c. under penalty of forfeiture of 5 *l. &c.* The fact stated by the commissioners, as proved by the witnesses, and confessed by the defendant, was this, *viz.*

That the defendant the said 14th of *July*, and long before, and ever since, was a common stage-coachman, using to drive a stage-coach between *Bow* in the county of *Middlesex*, being a place without the parishes and places within the bills of mortality, and the said *Whitechapel-bars* in the parish of *Whitechapel* in the county of *Middlesex*, being within the parishes and places within the weekly bills of mortality; and at the time mentioned in the information *viz.* the said 14th day of *July*, stood with his stage-coach and horses in the high street at the said place called *Whitechapel bars*, and plied and offered for hire to carry any person wanting such carriage to *Bow* or *Stratford* in his stage-coach; and that the defendant then and there took into his stage-coach three persons, and carried them thence in his stage-coach to a place called *Whitechapel turnpike*, being a place within the weekly bills of mortality, and there at *Whitechapel turnpike* the defendant in the way from *Whitechapel* aforesaid to *Bow* and *Stratford* aforesaid set down out of his stage-coach one of the said three persons, and received of him six pence for his hire, for carrying him, &c. that

that the defendant drove his coach from thence, and carried the two other persons from thence to *Bow*, and there set them down, and received of each of them 6*d.* for hire, for carrying them in his stage-coach; and that the defendant before in that day had come with his stage-coach from *Bow*, and had not set up his stage-coach at any inn or at any other place, but stood with his said stage-coach and horses in the said high street plying as aforesaid, and had no licence to carry persons in his said stage-coach for hire.

This conviction being removed into the king's bench by *certiorari*, Mr. *Abney* moved to quash it, because the fact stated in the conviction was not an offence within the act of parliament of 1 G. c. 57. s. 3. nor within any of the acts about licensing coaches, &c. Mr. *Reeve* *e contra* for the king. But the court were of opinion, this was not within the acts; for the defendant did not ply to drive or carry, or drove or carried persons, only within the weekly bills of mortality, but he plied with his stage-coach to carry them the stage he drove, *viz.* to *Bow* or *Stratford*; and though the party was set down within the weekly bills, *viz.* at *Whitechapel* turnpike, yet he paid for the whole stage. But if the defendant had took less than his hire for the whole stage; in this case the court inclined to be of opinion, that would have been within the acts of parliament. 2. The court held, that s. 3. of 1 G. c. 57. was made to prevent plying or driving for hire, or letting coaches or horses for hire, to wait and attend upon funerals, which was not this case. The conviction was quashed, June 7, 1727.

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v.
BETTS.

William Townsend against Henry Thorpe.

THE plaintiff being clerk of the parish of *Warminster* in the county of *Wilts.* in *Hilary* term 1725 moved for a prohibition, to stay a suit against him in the court held before the defendant a surrogate of the vicar general of the bishop of *Salisbury*, for having led a wicked, lewd and debauched life, and for having committed and attempted to commit several filthy, obscene and unnatural acts of lewdness and incontinence; the libel setting out particularly several obscene acts committed by him with *Nicholas Deane*, *John Hawkins* and *William Bleek* [specifying the beastly acts in the libel, which amounted to evidences of attempts to commit sodomy]; for being a common and notorious drunkard, much addicted to cursing and swearing, &c. for being a profaner of the Lord's day: and this suit was against the plaintiff as clerk of the parish of *Warminster*; and the libel set out the 91st canon, that all parish clerks should be of an honest and sober life and conversation; and

A parish-clerk is a spiritual officer. S. C. Str. 776. Semb. cent. Str. 942. Fitz. 274. 13 Co. 70. Gro. Jac. 60. Palm. 672. 2 Keb. 286. March. 101. Godb. 163. Bendl. 142. 1 Leon. 24. And the spiritual court may deprive him for a temporal offence. S. C. Str. 776. vide ante 447. But cannot punish him for it in any other way. S. C. Str. 776. A parish clerk is

intituled to hold the office for life, tho' the time for which he shall have it is not mentioned upon his nomination.

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the suit was for punishment, and to remove the plaintiff from the office of parish clerk, &c. and this motion was grounded upon a suggestion, that these matters were considerable by the king's temporal courts, &c. and that two indictments were found against him at the sessions of *oyer and terminer* for the county of *Wilts*, for an assault with intent to commit sodomy with *Dean* and *Hawkins*, for the same facts charged in the libel. And a rule being made, to shew cause; it was argued against the prohibition by *Dr. Andrews*, *Mr. Fazakerley* and *Mr. Strange*, in *Hilary* term 1725. and by serjeant *Chapple* for the prohibition. Whereupon a rule was made, that a prohibition should go, and the plaintiff should declare upon it; which he accordingly did, turning his suggestion into a declaration. To which the defendant pleaded, to have a consultation, after taking by protestation that the plaintiff was guilty of the crimes mentioned in the libel set out in the declaration, that the naming and making the parish-clerk of the parochial church at *Warminster* aforesaid, as often as there was a vacancy, *pertinuit et de jure pertinere debuit et adhuc debet* to the vicar of that church for the time being; that the plaintiff before the exhibiting the libel, viz. 2 June 3 G. 1. by virtue of the ecclesiastical canons was named and made clerk of the parish-church by *J. L.* clerk, vicar of the said church, and that the plaintiff the place and service of clerk of the said parish-church by virtue of that nomination and making from thence to this time had held and enjoyed; that the defendant *Henry*, as surrogate of the vicar-general, &c. at the promotion of *T. L.* and *R. S.* churchwardens of that church, *traxit in placitum praedictum Willielmum in praedicta curia Christianitatis de et pro materiis praedictis* in the libel mentioned, before the prohibition delivered to the defendant, *ea intentione ad ipsum* the plaintiff, *pro hujusmodi malegestura sua praedicta, pro reformatione morum ejus, et pro salute animae ipsius Willielmi, juxta leges ecclesiasticas castigando et puniendo, et a loco et servitio suo parochiali clerici ecclesiae praedictae amovendo, libellando versus eum in eadem curia Christianitatis de et pro materiis praedictis, &c.* prout ei bene licuit, &c. and prays a consultation. To this plea the plaintiff demurred, and the defendant joined in demurrer. And the cause came on in the paper this term to be argued by counsel. But the counsel for the defendant desiring only liberty to proceed against the plaintiff in the ecclesiastical court, to deprive him of his office; and the court being of opinion, that the plaintiff, though nominated by the vicar generally, was intitled to hold the office for his life, which resolution they grounded upon the authority of 2 *Salk.* 536. the case of the parishes of *Gatton* and *Melwitch*; and that although an offence was punishable in the temporal and not in the spiritual courts, yet there might be a proceeding thereupon in the spiritual court to deprive a clerk of a parish-church, though

though they could not proceed to punish him for it. So is *Sidersf.* 217. 1 *Lev.* 138. *Slader v. Smallbrook*; proceedings allowed in the spiritual court to deprive a person of orders he having forged the letters of ordination, though they could not have proceeded there to punish for the forgery: to prevent the repeating the long arguments used upon the motion, where the question was made, whether all the crimes in the libel were not punishable only by the temporal laws, or whether of some of them the ecclesiastical court could not have consueance, which would be unnecessary, since supposing they were all of them punishable only by the temporal laws, yet there might be proceedings upon them, to deprive the plaintiff of his office; the court gave judgment, that the prohibition should stand as to all but the proceeding for a deprivation, and as to that a consultation should go. *June 13, 1727. Intt. Trin. 12 Geo. B. R. Rot.*

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Michaelmas Term

11 Georgii 2^o Regis, B. R. 1727.

HIS late Majesty King George dying at Osnaburg the 11th of June last, the judges commissions by the act of parliament were to continue in force for six months from that time, unless sooner determined by the successor. But about the middle of September his present Majesty King George the second gave directions for passing new patents, which were passed accordingly to all the late king's judges, except Mr. justice Fortescue, whose patent was superseded; and Sir Francis Page was removed out of the common pleas into the king's bench in his room; and Spencer Cowper, Esq. attorney-general to his majesty when prince of Wales, and chief justice of Chester (which place he had granted to him by the late king, to be chief justice of Chester to him, his heirs and successors, quamdiu se bene gesserit) appeared to a writ returnable in chancery the first day of this term, commanding him, to take upon him the degree of a serjeant at law, and was sworn in chancery, and performed the usual ceremonies, and then by patent was created one of the judges of the common pleas in the room of Sir Francis Page.

Holliday against Fletcher, administratrix of Moses Fletcher.

Intr. Trin. 13
Geo. 1 B. R.
Rot.

S. C. Str. 781. 1 Barnard. B. R. 29.

In an action against an administrator in the king's bench by bill, if the plaintiff files him administrator the first time he mentions him in the declaration, he need not aver specially, that administration was committed to him. Vide Imp. Pr. C. B. 194. 1 Sid. 228.

IN an action upon the case upon several promises for goods sold and delivered to the intestate, the plaintiff declared against the defendant *Phillis Fletcher, vid', administratrix. omnium et singulorum bonorum et cataliorum jurium et creditorum quae fuerunt Moses Fletcher nuper viri sui defuncti, tempore mortis suae, qui obiit intestatus, in custodia marreschallii marreschalciae, &c.* and then sets out the promises made by the intestate, &c. The defendant demurred to the declaration, and assigned for cause of demurrer, that it is not

alleged

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alleged or shewn, that *administratio omnium et singulorum bonorum, &c. unquam commissa fuit, nec per quem metropolitanum ordinarium officialem aut alium officarium (si ulla) ei fuit commissa. &c.* The plaintiff joined in demurrer. And Mr. Wynne for the plaintiff admitted, that a plaintiff was not obliged in his declaration against an administrator to shew by whom administration was committed; because it did not possibly lie in his knowledge, who granted administration. But then the plaintiff ought to allege, that administration was committed to the defendant. And so is the case of *Bracton v. Lister, 2 Ventr. 84.* express in point; where it was held by the court, that the omission of the alleging, that letters of administration were committed to the defendant, was incurable. But Mr. Hussy for the plaintiff argued, that it was alleged in the declaration, that the defendant was administratrix; for the plaintiff declares against her, *administratric. &c.* and that was traversable, and therefore sufficient, without alleging, administration was committed to her. He said, that indeed the method of declaring against an administrator in the common pleas was different, for there it is *A. B. administrator of C. D. &c. summonitus fuit ad respondendum E. F.* but then in the declaration the defendant is not alleged to be administrator, as in this case; and therefore it must be alleged, that administration was committed, in the declaration, otherwise the defendant will be deprived of the benefit of traversing that fact. And therefore in a case lately between *Ross and Helmer* it was adjudged, that a declaration against an administrator, for want of alleging that fact, was ill; and probably that was the reason of the case of *Bracton v. Lister*, in 2 *Ventr.* for that was in the common pleas. The court having took time to consider of it, at another day gave judgment for the plaintiff. For they held, that suing the defendant as administratrix did of necessity imply, that administration was committed to her; for no persons can be administrators, but by having letters of administration granted to them; and that the defendant might in this case have traversed that fact alleged, that she was administratrix; which they held likewise to be sufficiently averred, by suing her as administratrix, &c. as above. Judgment for the plaintiff, November the 23d, 1727.

The King *vers.* the inhabitants of Aynhoe.

S. C. Fitz. 3.

TWO justices of peace, by their order under their hands and seals of 22 Sept. 1727, removed *Thomas Edmonds* and *Elizabeth* his wife from the parish of *Aspenden*

A service for a year uninterruptedly will confer a settlement, if any of

those hirings was for a year. R. acc. ante 426. Fort. 316. 1 Sess. Cal. 6. pl. 5. 226. pl. 183. Vide Burn's Poor Settlements, vi. 14. h. ed. vol. 3. p. 391. 409.

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cum Pollicutt in the county of *Bucks* to the parish of *Aynhoe* in the county of *Northampton*, as the place of their last legal settlement. From which order the inhabitants of *Aynhoe* appealed to the next quarter sessions of the peace held for the county of *Bucks*, 5 October 1727. where upon hearing the order of the two justices it was confirmed; in which order of confirmation the fact was stated specially, to the intent a *certiorari* might be brought to remove the orders into the king's bench, that the opinion of that court might be had thereupon. And the fact specially stated was this, viz. that the said *Thomas Edmonds* about fourteen years since was hired for a year to *Abraham Wrighton* at *Aynhoe*, and served him the same year, and received his year's wages, and afterwards at *Michaëlmas* 1725 went to Mr. *Thomas Potter* at *Bisseter* in the county of *Oxon* to be hired; who told him he would not hire him then, for that he expected a man-servant in three weeks; but if he the said *Thomas Edmonds* would supply the place of such man-servant till he came, then he the said *Thomas Potter* would pay him for his time: whereupon the said *Thomas Edmonds* entered into the service of the said *Thomas Potter*, and lived there till near *Christmas* following, and then was hired to him and served him at *Bisseter* till *Michaëlmas* then following; and then at *Michaëlmas* 1726 he was hired at *Bisseter* aforesaid for a year to his said master *Potter*, and stayed in such service till the *Midsummer* following, and no longer. These orders being accordingly removed into the king's bench by *certiorari*, it was argued by Mr. *Lee* for the defendants, that the order ought to be quashed, *Thomas Edmonds* appearing to be last settled at *Bisseter*; because, though the statute requires a hiring for a year, and a service for a year, it does not require the hiring and service should be under the same contract. And he relied upon the case of the inhabitants of *Brightwell* and *Westhanning*, 10 Mod. 287. 1 Sess. Caf. 92. pl. 37. fol. 198. as the very case in point: where it was resolved and settled, *Hil. 1 Geo. 1. B. R.* when the earl of *Macclesfield* was chief justice. Mr. *Reeve* contra argued, that it did not appear, *Edmonds* was settled at *Bisseter*; because he insisted, he ought to be hired for a year, and serve that year. And he said, it had been held between the inhabitants of *Rudwick* and *Dunsfold*, *Salk. 533. Sett. & Rem. 2.* that if a poor man is hired for half a year, and serves that half year, and then is hired to the same master for another half year, and serves that half year also, that would not make a settlement. But the court upon the authority of the case of *Brightwell* and *Westhanning* held, these hirings and service did make a settlement; for he was hired for a year, and served a year. And the orders were quashed.

Hilary Term

1 Georgii 2. regis, B. R. 1727.

Hannah Lee *vers.* John Pilmy. *Error.* C. B.

THE plaintiff brought an action of debt on a bond, as executrix to her husband, against the defendant *Pilmy* in the common pleas. *Pilmy* confessed the action, whereupon judgment was given for *Lee*. Upon which judgment *Pilmy* brought a writ of error in the king's bench, and assigned for error by his counsel *Mr. Parker*, that this action was brought by the plaintiff as executrix in the *debet* and *detinet* whereas it ought to be in the *detinet* only. But to this it was answered by *Mr. Draper*, that this would be aided after verdict by the *Oxford act*. 1 *Lev.* 250. 1 *Sid.* 379. *Frewin et ux. v. Panton*. And the act of 4 *Ann. c. 16. s. 2.* extends all the statutes of *jeofails* to judgments to be entered upon confession, &c. And of this opinion was the court, and judgment affirmed, *Feb. 8, 1727.*

Intr. Trin.
13 Geo. 1. B. R.
Rot. 2110.
Intr. Hjl. G. 2.
B. R. Rot.
No objection can be taken after a judgment by default because an action of debt which ought to be brought in the *detinet* only is brought in the *debet* and *detinet*. Vide ante 1391. 1 *Sid.* 342. pl. 6.
1 *Lev.* 124.
An executor cannot properly sue as such in the *debet* and *detinet*. R. acc. ante 698. 1391.

Carter *vers.* Jewell.

THE defendant was took up upon an escape warrant made by my brother *Fortescue*. And a motion was made to discharge him and the warrant, because he was took upon it the 6th of *January* instant; and my brother *Fortescue* was removed from his office of judge of the king's bench in *October* before; his patent being determined upon the demise of the late king. And the person was discharged, and the warrant also.

fecerint, et quilibet eorum finem faceret dicto domino regi pro offensus suis respectivis praedictis, de quibus quidem praemissis supradictis hoc fieri facimus recordum: in cujus rei testimonium nos praefati E. B. bar' P. B. et W. P. arm' justiciarii praedicti hunc recordo manus nostras et sigilla nostra apposuimus apud parochiam de Beckingham praedictam in comitatu Cantiae praedictae decimo quinto die Septembris anno regni dicti domini regis nunc primo supradicti.

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Elwall.

E. Bettenfon,
P. Burrel,
W. Passenger.

Exception being taken to this conviction, that it was ill, because the commitment was of the defendants to gaol *ibidem remansur*. till each should have paid a fine to the king; and the justices of the peace have assessed no fine; so that it amounts to an indefinite commitment to prison, which is illegal. Against which it was argued by serjeant *Whitaker* for the king, that this court might assess the fine, and so they did in the case of the *King v. Chaloner*, 1 *Keb.* 585. But as to that case the court said, the party submitted to a fine, a very small one being set, upon the circumstances of the case. And the judges were all of opinion, that the justices might and ought to set the fine, they being best apprised from their view of the nature of the offence, and that they need not *so instanti* set it, but might adjourn for a little time to consider of the fine. And justice *Page* said, lord chief justice *Holt* held so in the case of the *Queen v. Leighton* warden of the *Flota*. They held also, that if a *certiorari* came to them, they might proceed to set a fine, and compleat their judgment, and it would be no contempt. And therefore they all held, that this commitment being, that the defendants should lie in prison till they pay their fine, and no fine was set; the conviction was naught, and was quashed, and the defendants discharged *February* 18, 1727.

George Turvil against Steven Aynsworth.

S. C. as to the third exception. Str. 787.

THE defendant gave the plaintiff a note under his hand, viz. *London*, 31 *May*, 1720, I promise to accept of Mr. *George Turvil* or his assigns 800*l.* *South Sea* stock on the 31st *May* 1721. and pay him or his assigns 5600*l.* for the same, witness my hand *Steven Aynsworth*. The plaintiff gave the defendant the like note, promising to transfer, &c. And in an action brought upon this promise, the plaintiff declared, that the defendant in consideration that the plaintiff had promised to transfer to the defendant upon the 31st of *May* 1721. 800*l.* in capitali fundo

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gubernatoris et societatis mercatorum Magnae Britanniae negotiantium ad maria Austriae et alia loca Americae et pro incitatione piscationis, Anglice vocato South Sea stock, promised to accept it, and pay 5600*l.* &c. Upon *non assumpsit* pleaded, the cause came to be tried before me last Trinity term at Guildhall; and upon the trial the defendant's counsel took several exceptions. 1. That the contract, though registered, was not registered according to the act of parliament. 2. That there was not proof of a proper tender by the plaintiff to transfer, &c. and, 3. That the plaintiff had mistook the name of the *South Sea* company, for there was no such word as *Australia* for *South* but the proper *Latin* word was *Australia*. Whereupon it was agreed, the plaintiff should have a verdict, with liberty for the defendant to move for a new trial; if the court of king's bench should be with him in any of his exceptions. As to the two first I was clear of opinion upon the trial, and so was the court of king's bench upon the subsequent motion. 1. that the contract was registered according to the act, the plaintiff having registered that note which the defendant gave, though he had not registered the note he gave the defendant, it being out of his power, the defendant having that in his custody: 2. that the evidence was a proof of a proper tender to transfer, &c. But then as to the third exception, it being moved in the king's bench and argued by counsel on both sides, the (a) court was unanimous of opinion, that the plaintiff had failed in proving his declaration; for the evidence being of a promise to accept *South Sea stock*, and the name of the corporation being set out with an insensible and improper word, viz. *Australia* instead of *Austral* did not describe that corporation, and by consequence the agreement set out in the declaration was to transfer a different stock from that which was proved by the evidence. And they held, that if the word *Australia* was rejected, as the counsel for the plaintiff would have it, that would not help the plaintiff; for then the corporation described would be, the governor and company of merchants trading to the seas and other places in *America*, &c. but would not be that corporation, part of whose stock was proved to be agreed to be transferred, and the verdict was set aside, and a new trial granted, February the 7th, 1727.

(a) Vide Dougl.
134. N. 25.

Lea *vers.* Welch. Error C. B.

Intr. Trin. 13
Geo. 1. B. R.
Ret. 304.

S. C. Str. 793.

A count stating that the defendant was indebted to the plaintiff in 10*l.* and being so, would pay to the plaintiff omitting the promise, is bad.

THE plaintiff below *William Lea* brought an action upon the case against *Richard Welch* in the common pleas, and declared upon several promises; and the first count was, that the defendant *Welch* was indebted to the

plaintiff

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plaintiff in 10l. for goods sold and delivered, *et sic inde indebitatus existens idem Ricardus postea, scilicet the same day and year at, &c. praediſtas decem libras praefato Willielmo cum inde postea requisitus esset bene et fideliter solvere et contentare vellet.* There were other counts in the declaration. The defendant let judgment go by *nil dicit*, and after a writ of inquiry executed and intire damages found, judgment was given for the plaintiff. Upon which the defendant *Welch* brought this writ of error. And Mr. *Parker* for the plaintiff in error took an exception to the declaration, because it was not alleged, that the defendant promised the plaintiff, that he would pay; so that there was no promise by the defendant, which was the foundation of the action. And he cited 1 Lev. 164. *Buckler v. Angell*, as a case adjudged in point. In *assumpsit* the plaintiff declared, that in consideration that he would surrender a term, the defendant *solvere vellet* 10l. after verdict for the plaintiff upon *non assumpsit* judgment was arrested, because no promise was laid, and then no issue was joined. The same case, 1 Sid. 246. He cited also C. o. Eliz. 913. Noy 50. Law against *Saunders*, that after a verdict it would not be good.

S. C. Raym. 23.
1 Keb. 378.

Mr. *Clive* for the defendant in error relied upon the case of *Roe v. Gatehouse*, ante 145. where in case upon several promises, in the second count there was an omission as here of laying a promise by the defendant, and yet the court held it good, and affirmed the judgment upon the writ of error brought. He cited also 1 Sid. 306. *Bedford v. Uffington*. But the court held, that the case of *Roe v. Gatehouse* did not come up to the present case, because there was a promise laid in the first count, and it is upon that the court there laid great stress, and said that the nominative case should go quite through, but here is the defect in the first count. And the case of *Buckler v. Angell* as reported by *Levinz* is the very case. And therefore they held, the declaration was ill, and judgment was reversed, Feb. 6, 1727.

Easter Term

I Georgii 2. regis, B. R. 1727.

The King *vers.* Thomas Hayes.

Intr. Pasch. 13
Geo. 1. n. 14.
B. R.

Upon an indictment if the defendant's clerk in court makes out the nisi prius roll, any variance he may make from the plea roll shall after a special verdict to give the defendant the benefit of the variance, be amended. S. C. Str. 843. 1 Barnard. B. R. 31, 32.

No judgment can be given on a verdict which leaves undecided any part of the matter put in issue. R. acc. ante 324. 3 Lev. 55. Str. 1059. Hardr. 166. d. acc. Gilb. C. B. 3d. Ed. 156. Com. Pleader S. 19. 2d. Ed. vol. 2. p. 161. If a special verdict upon an indictment forthwith of fences finds facts which prove the defendant guilty of two, and refer it to the court

whether he is guilty of the offences in the indictment, it shall be considered as finding him guilty of the two, and not guilty of the other. S. C. Str. 843. 1 Barnard. B. R. 41. *Quia* reports alius. R. acc. ante. 119. D. acc. Dyer, 70 b. Hardr. 178. on an indictment for forging and publishing a bond, the distresses may be to make a jury between the king and the defendant *de quibusdam transgressionibus, contemptibus & falsis fabricationibus*. S. C. 1 Barnard. B. R. 142. If a statute directs that a person convicted of an offence either by action on the statute or otherwise according to law shall pay the grieved double costs and damages to be assessed by the court in which he shall be convicted, &c. Whether a person convicted in B. R. upon an indictment shall be liable to pay such costs and damages. S. C. 1 Barnard. B. R. 142. And if he is, how they shall be assessed.

AN indictment was found 20th Feb. 1726, at *Hick's Hall* before the justices of *Oyer and terminer* for *Misdemeanor* against the defendant and one *William Hayes*, for that they intending to defraud the executors of *Edmund Longbotham* of 280 l. 30th of *October* 1720. forged a certain writing *vocatum* a bond purporting to be an obligatory writing under the hand and seal of the said *Edmund Longbotham*, and to bear date the 18th of *June* 1718. to the said *Thomas Hayes*, in the penalty of 560 l. with condition to pay 280 l. on the first of *December* next following the date, &c. then the indictment proceeds, that the said jurors further present upon their oaths, that the two defendants afterwards, viz. the said 30th of *October* 1720. did publish the said writing by them forged as aforesaid as a true bond, &c. *contra formam statut.* &c. then the indictment goes on, and the said jurors further say upon their oaths, that the said defendants afterwards, *scilicet* the said 30th of *October* anno *ultimo* *prædicto* quoddam [not saying aliud] *falsè fabricatum* scriptum, purporting to be made under the hand and seal of the said *Edmund Longbotham*, and to bear date the 18th of *June* 1718. to the said *Thomas Hayes*, in the penalty of 560 l. with condition to pay 280 l. upon the 1st of *December* next following the date of that writing, did publish, knowing it to be forged, &c. *contra formam statut.* &c. The defendants removed this indictment into the king's bench by *certiorari*, and pleaded not guilty; and the cause came on for trial before me the sitting after *Trinity* term 1727. And upon producing the forged bond in evidence, it was insisted upon by the defendant's counsel, that there was a material

variance between that produced in evidence and that laid in the indictment; for it was laid in the indictment, in *quo quidem scripto mentionatur praedictum Edmundum Longbotham* [Note, he had not before been set out to have been of any place *per nomen Edmundi Longbotham de Limehouse in parochia de Stepney in comitatu Middlesex*; but the bond produced in evidence was, *Edmundum Longbotham de Limehouse in paroch. de Stepney in comitatu Middlesex*; whereas *paroch.* does not signify a parish, nor is there any such word, the consequence of which would be, that he is described to be of a different place than he is mentioned to be of in the forged bond; and therefore a material variance. But the counsel for the king, not admitting the variance to be material, alleged, that the defendant having removed the indictment by *certiorari*, made up the record and brought it down; and that this was not thus in the original indictment, but the record was made up wrong on purpose that he might be acquitted; for the counsel for the prosecutor said, they were instructed, that the original indictment was in *paroch.* and so agreed with the forged bond produced in evidence. Whereupon I proposed, they should proceed in the trial, and if the jury should be of opinion, that the defendant did forge the bond produced in evidence, they should find a special verdict, upon which the variance would appear, and if material the defendant would have the benefit of it, and the prosecutor would have an opportunity to apply to the court, and try if it could not be set right, supposing this fault was made in the record of *nisi prius* contrary to the indictment by the defendant or his clerk in court. Upon which the trial went on, and after a good deal of evidence of both sides (but the strength of the evidence was clearly with the prosecutor) the jury brought in their verdict, that the defendants were guilty of forging the writing purporting the bond given in evidence; and thereupon they found their verdict specially, that the defendant might have the benefit of the variance, &c. Afterward in Hilary term 1727. it was moved on behalf of the prosecutor in this cause, that the *nisi prius* roll might be amended by the plea roll, and the word *paroch.* in the indictment in the *nisi prius* roll made *paroch.* as it was in the indictment upon the plea roll, the record having been made and carried down to trial at *nisi prius* by the defendant's clerk in court, as was supposed, to procure an acquittal. And after hearing counsel on both sides, the court made a rule for an amendment accordingly, January 25, 1727. whereby there was no variance between the forged bond set out in the indictment and that found in the special verdict, remaining upon the record. And now this term the cause was set down in the paper to be argued upon the special verdict, which special verdict was this; the jury found, that the defendant 30th of October in the indictment mentioned, at the place in the indictment laid in the county of *Middlesex* for that purpose, did forge *quoddam*

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scriptum super papyrum, Anglice vocatum a bond in verbis literis et figuris sequentibus, viz. Noverint universi, &c. and so find it in *hæc verba*, with the condition, exactly as laid in the first part of the indictment: and then the jury farther find, that the defendants afterwards, viz. the said 30th of October, *praedictum falsum fabricatum et contrafactum scriptum super papyrum in verbis literis et figuris praedictis ut praefertur, expressum et specificatum* by the said defendants *ut praefertur*, forged, *falso et scienter* at the place laid in the indictment for that purpose in *Middlesex* did publish: but whether upon the whole matter the defendants or either of them are or is guilty *de transgressione contemptu falso fabricatione et malegestura praedictis in indictmento praedicto interius specificatis modo et forma* as by the said indictment against them is supposed, or not, the jury are ignorant, and pray the advice of the court; and if the court shall be of opinion, they are guilty, or either of them is guilty *de transgressione contemptu falso fabricatione et malegestura praedictis*, then they find them guilty; and if the court shall be of opinion, they are not guilty, &c. then they find them not guilty, &c. And it was argued by Mr. serjeant *Eyre* and Mr. *Fazakerley* for the defendants, that no judgment could be given against them upon the verd^t, because it was imperfect and incomplete, inasmuch as that in the indictment three distinct offences are charged, 1. That (a) the defendants forged the bond dated the 18th of June 1718. 2. That they published that very forged bond. 3. That they published *quoddam scriptum falso fabricatum* 18th of June 1718, knowing it to be forged, which must be took to be a different bond from that charged to be forged in the beginning of the indictment. It is not said *idem scriptum*, but *quoddam*, which must be took to be another than what was mentioned before. But as to that last offence the jury have found nothing, for they only find, that they forged *quoddam scriptum*, &c. and so set out (which now, since the record is amended, exactly agree with that first set out in the indictment) and that they published that forged writing, &c. and then make the general conclusion: but say nothing as to the defendants publishing the last writing, knowing it to be forged; but as to that, they ought to have found the defendants not guilty. And they cited several cases to prove, that a verdict that finds but part of the matter put in issue, and says nothing as to the rest, is insufficient; because the jury have not tried the whole issue; as in an information of intrusion into a messuage and 100 acres of land, on the general issue the jury find the defendant guilty as to the land, but say nothing as to the messuage; this is ill for the whole. *Co. Lit.* 279. a. and the judgment given upon that verdict was reversed. So *Cro. Eliz.* 133. *Finymore v. Sanby*. Debt for 7*l.* 13*s.* 4*d.* on *nil debet* the jury found, that the defendant owed 6*l.* 13*s.* 4*d.* but said nothing as to the rest; after judgment given for the plaintiff, judg^{ment}

(a) Vide ante
3461.

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ment was reversed. So if several issues are joined, and the jury find some of them well, and as to the others find a special verdict, which is imperfect; a *venire facias de novo* shall be granted for the whole. 2 Roll. Abr. 722. pl. 19. They cited also cases where upon defects in the special verdict, a *venire facias de novo* should issue; as Cro. Jac. 31. *Auncelme v. Auncelme*. In trespasss for entring into lands, &c. the jury *quoad parcelam, tenementorum* find a special verdict, and say nothing as to the rest; a *venire facias de novo* issued. To the same purpose is Cro. Jac. 113. *Woolmer v. Caston*, and Cro. Jac. 653. *Treswell v. Middleton*. They urged farther, that in this case there was no fact found, that could be applicable to the publishing this last forged writing, what is found being applicable to the first; and therefore the court have no foundation to consider of this last offence, though the verdict is special. And for that 2 Siderf. 86. *Street v. Sir Will. Roberts*, was cited, where it is laid down, that in all special verdicts the judges will not adjudge upon any matter of fact, but that which the jury declare to be true by their own finding, and therefore the judges will not adjudge upon an inquisition or *aliquid tale* found at large in a special verdict; for their finding the inquisition does not affirm, that all in it is true. They concluded with citing 3 Lev. 55. *Graves v. Morley*. Trespasss for taking his coat and cloak; on not guilty the jury found a special verdict, that the defendant being a constable took the coat for a tax, but say nothing as to the cloak; and the court held the whole was discontinued. And therefore they insisted, that in the present case the whole was discontinued, or else that a *venire facias de novo* ought to issue; but that no judgment could be entred on this special verdict against the defendant.

On the other side it was argued by Mr. serjeant Sheppard for the king, that the court might and ought to give judgment against the defendant; for tho' he agreed many of the cases put by the counsel for the defendant to be good law, yet in this case, as the defendant's plea goes to all in the indictment, so does the special verdict; for their conclusion is, whether the defendants are guilty *de transgressionibus contemptibus falso fabricationibus et molestationibus praedictis*, &c. and then the court will judge, whether the defendants are not guilty of the whole, or of what part thereof they are not guilty.

The court agreed, that the cases cited out of C. L. and Cro. Eliz. are certainly law; for if a jury finds but part of the matter put in issue, and says nothing as to the rest; the verdict is ill, and a *venire facias de novo* shall issue, if no judgment is given; but if judgment is given upon such verdict, it shall be reversed. So if a special verdict is imperfect, and don't take in the whole in issue, a *venire facias*

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de novo shall be granted. Or if the special verdict is such, that no judgment can be given upon it, as the case cited of *Cro. Jac.* 51. But then the court held, that in this case, as the not guilty went to the whole indictment, so the verdict was found as to all the offences charged in the indictment. They have found all the facts proved before them, and submit it to the court, whether that does not maintain all the charges. They might doubt, though the proof was but of forging one bond, and the publication of that bond, whether they upon their oaths could safely say, he was not guilty of publishing *quoddam scriptum*, &c. knowing it to be forged, it not being alleged in the indictment, that it was *aliud scriptum* different from the first, and therefore would leave that to the judgment of the court. Then in this case the indictment being for three distinct offences, which in their nature are several, and the facts found by the special verdict fully maintaining the two first charges, as to them the verdict was found for the king; but as to the third offence, when they considered whether any fact found maintained that, the court was of opinion, no fact found in the special verdict did prove that; because they took it, that although the indictment did not mention *aliud scriptum*, yet when it mentioned it by the way of *quoddam scriptum*, it was not to be took to be the same as that mentioned before; and then proof, but of forging one bond, and publishing that one bond, &c. that was not properly applicable to this last charge; and therefore held, that as to this last charge the verdict was with the defendants; and declared the special verdict had found the defendants guilty as to the two first offences, and not guilty as to the last. *May* 27, 1728.

At another day Mr. serjeant *Byre* moved for the defendants in arrest of judgment. And his exception was to the *distingas*, that it was *ad faciendum quoddam juratam inter*, &c. *de quibusdam transgressionibus contemptibus et falsis fabricationibus unde indictati existunt*; whereas the indictment was for forging and publishing a forged bond, but there was no trespass nor contempt in the indictment. And in the indictment one offence was for publishing a forged bond knowing it to be forged, which is not in the *distingas*; which is a fatal fault, as the counsel for the defendant argued, and cited *Cro. Eliz.* 622. *Clerk v. Clerk*, the action was an ejectment, and the *venire facias* was *ad faciendum juratam in placito transgressionis* whereas it should have been, *in placito transgressionis et ejus tione firmas*, and therefore held a mis-trial, and a *venire facias de novo* was awarded. So 2 *Lev.* 85. *Gunter v. Clayton*; in case for an escape against a sheriff upon an arrest, they declared upon a *latitat in placito transgressionis*, and the writ produced was *in placito transgressionis ac etiam billae* 201. and this was held an incurable variance, And in the present case,

the variances between the indictment and *distingas* are incurable. But the master and clerks of the crown office certifying the court, that this was the constant form of making out the *distingas* in such cases; that their precedents were all so, and that if this exception was allowed, it would overturn all their judgments after verdicts for misdemeanors and forgeries, &c. the court over-ruled the exception.

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The defendant *Thomas Hayes* was afterwards brought up for judgment. And Mr. serjeant *Chapple* and Mr. *Kellaby* moved, that as this indictment was founded upon the statute of the 5 *El. c. 14.* judgment must be given against the defendant *Thomas Hayes* (*William Hayes* not being in custody) according to that statute, and that *John Longbotham* their client, being the party grieved, ought to have double costs and damages. For by the 3d *sect.* of 5 *El. c. 14.* it is provided, that if a person is convicted for forging a bond, or of publishing a forged bond knowing it to be forged, that then he shall pay unto the party grieved his double costs and damages, to be found and assessed in such court, where such conviction shall be, &c. And now the conviction being in this court, they insisted, the court ought to find and assess the damages; and cited for that, 3 *Inst.* 171, 2. *Gre-wile v. Hind*, and 2 *Brownl.* 49. where they were assessed by the court where the party was convicted, viz. in the star chamber. But the court was in great doubt, whether they could, or if they could, what methods they should take to find and assess the damages in this case. For by the 2d *sect.* of that stat. of 5 *El. c. 14.* which inflicts the penalty for forging or publishing a false deed, whereby another's freehold should be molested, &c. it is enacted that if any person should thereof be convicted, either upon action or actions of forgery of false deeds to be founded upon that statute at the suit of the party grieved, or otherwise according to the order and due course of the laws of this realm, or upon bill or information to be exhibited into the court of star chamber according to the order and use of that court, he should pay unto the party grieved his double costs and damages, to be found or assessed in such court where such conviction should be, &c. then by *sect.* 3. which fixes the penalty for forging a bond, &c. which is the present case, it is enacted, that if any person shall be convicted by any of the ways or means aforesaid, he shall pay to the party grieved his double costs and damages, to be found or assessed in such court where such conviction shall be, &c. So that by the plain provision of the act the star chamber had power to assess these damages and costs, and upon that the cases cited were founded. So in forgery of false deeds the jury might give the damages, &c. But in an indictment no damages were to be given at common law; and therefore since no
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case nor precedent had been cited or produced, where damages have been given by the court upon such an indictment; the court thought it required consideration, whether it could be done, and by what methods they should inform themselves what the damages were, &c. and that therefore this coming on towards the close of *Trin.* term 1728. if the prosecutrix insisted upon the damages, it must go over till the next term. And thereupon the prosecutor's counsel, being very desirous to have judgment, they waved the consideration of the damages and costs, and prayed their judgment as to the rest according to the statute. Whereupon judgment was given against the defendant *Thomas Hayes*, that he should be set upon the pillory at *Charing Cross* such a day, and there have one of his ears cut off, and should be imprisoned for one whole year without bail or mainprise. And accordingly he did stand in the pillory, and one of his ears was cut off.

Evans *vers.* Hicks.

S. C. rather more at large Str. 797.

Vide 1 Will.
20, 78. Bl. 43.
Burr. 1676.
3 Will. 35. 3.
T. R. 79. Burr.
2017, 1731.
3 Will. 33.
Burr. 401, 1481,
2016.

RULE upon hearing counsel of both sides was made, to discharge the defendant out of execution by virtue of the statute of 7 Ann. c. 12. it being made appear to the court, that he was a domestick servant of the envoy from the elector *Palatine*, viz. his secretary, and that all the steps prescribed by the act were pursued. May 25, 1728.

Trinity Term

2 Georgii 2. regis, B. R. 1727.

Edward King and Judith his wife *vers.* Thomas Jones. *Error.*Intr. Hil. 13
Geo. 1. B. R.
Rot. 407.

S. C. Str. 811. 1 Barnard. B. R. 70.

THOMAS Jones brought an action upon the case upon several promises in this court by original against the defendant Judith as a *feme sole* by the name of Judith Parnell; and declared that she was indebted to the plaintiff 22d of October 1726. in 203 l. 8 s. for goods sold and delivered, &c. The defendant Judith pleaded in this manner; *et praedicta Juditha King quae arrestata fuit per nomen Judithae Parnell* by her attorney pleaded *non assumpsit*. Upon which issue being joined, at the assizes a verdict was found for the plaintiff, for 41 l. 18 s. and costs 40 s. Upon which judgment was given for the plaintiff Jones for the damages and costs *de incremento* in all 63 l. Thereupon an entry was made upon the record, that *die Lunae in tribus Pascha 13 Geo. 1. veniunt quidam Edwardus King et praedicta Juditha in propriis personis suis*, and produced a writ of error *de et super praemissis praedictis*, which writ follows in *haec verba*; which was a writ of error directed to the justices of the king's bench, reciting that in records *et processu ac etiam in redditione iudicii loquelas quae fuit in curia nostra, coram nobis inter Thomam Jones et Juditham uxorem Edwardi King per nomen Judithae Parnell, &c. posteaque, &c. veniunt praedicti Edwardus King et Juditha per nomina Edwardi King et Judithae uxoris ejus* by their attorney, and assign for error, that it appears in the said record, that the said Judith comperuit et placitavit in placito praedicto ut *femina sola per attornatum suum, ubi in facto eadem Juditha tempore comparentiae et placitationis praedictae fuit cooperta cum ipso praefato Edwardo King viro suo, viz. apud, &c. et sic eadem Juditha tempore comparentiae praedictae non facere seu nominare aliquem attornatum nec comperuisse aut placitasse debuit sine praedicto viro suo, &c.* Jones the defendant in error came in, and after several

If an action is brought against a *feme sole*, tho' she marries before she appears or pleads, she may appear and plead by attorney without her husband.

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several imparlances pleaded to the assignment of errors, that the said *Edward King* and *Judith* ad dicendum seu allegandum pro errore ad iudicium praedictum revocandum quod ipsa eadem *Judith* praedicto tempore coopta fuit cum ipso praefato *Edwardo King* prout superius pro errore per praedictos *Edwardum* et *Juditham* allegatur admitti non debent quia dicit quod he the said *Thomas Jones* 18 October 13 Geo. 1. sued out of chancery a writ against the said *Judith* as a *feme sole*, &c. et in placito praedicto in recorde praedicto mentionato, and so sets it out at large; and that the sheriff of *Surrey* returned a *nichil*, whereupon a *copias* issued against the said *Judith*, upon which the sheriff returned a *non fuit inventa*; whereupon he sued out a *testatum* into *Middlesex*, to which the sheriff returned a *cepi*, and that he had her body ready, &c. and that then and there in this court venit praedictus *Edwardus King* in propria persona sua et quidam *Johannes Kison* in propria persona sua, and the said *Edward King* and *John* entered into a recognisance to the said *Edward Jones* in 80 l. under this condition, that si contingeret eandem *Juditham*, in praedicto placito convinci, that she the said *Judith* should pay the said *Jones* the damages recovered, or render her body to the custody of the marshal of the *Marshalsea* of this court, &c. prout patet per recordum praedictorum separatim brevium et retornorum eorundem brevium ac per recordum recognitionis praedictae hic in curia de recorde residentia plenius liquet et apparet, &c. unde petit iudicium si praedicti *Edwardus King* et *Juditha* contra recognitionem praedictam sic ut praefertur de recorde remanentem ad dicendum seu allegandum quod praedicta *Juditha* praedicto tempore fuit coopta cum ipso praefato *Edwardo King* prout superius pro errore per ipsos *Edwardum* et *Juditham* allegatur admitti debeant, &c. et quod iudicium praedictum in omnibus affirmetur, &c. To which plea in bar of the assignment of errors there was a demurrer, and joinder in demurrer.

And serjeant *Chapple* for the plaintiffs in error insisted, that the error assigned being a matter of fact, viz. coverture, it was confessed by the plea to the assignment of errors; in the same manner as if infancy is assigned for error, it is confessed by a plea of *in nullo est erratum*; and in that case, if the defendant in error would contest it, he ought to take issue upon it. 1 Lev. 294. *Grell v. Richards*; and *Raym.* 231. *Oakeover v. Overbury*. Then the coverture being confessed, the judgment is erroneous, for a *feme covert* cannot appear by attorney; and if she does, and judgment is given against her, her husband and she shall join in a writ of error, and reverse the judgment. So is 18 E. 4. 4 Br. Error 173. Br Joinder in action 88. & 1 Roll. Ab. 748. pl. 18. *Hayward v. Williams*. Style 254. 280. where an action was brought against a *feme covert* as a *feme sole*, and she pleaded to issue as a *feme sole*, and

and afterwards judgment was given against her, and she was took in execution; she and her husband may bring a writ of error, otherwise her husband would be prejudiced in the loss of her company and care about his family; and he has no other means to help himself. But in case of a fine, the husband may enter and avoid it. And in 1 *Rel. Ab.* 759. *Edwards v. Simpson*, which is the like case, it is said, that they may assign for error, that she was a *feme covert* at the time of the appearance and plea. And so the error is assigned in this case; and therefore he prayed, that judgment might be reversed.

Serjeant *Whitaker* for the defendant in error insisted upon it, that the judgment was well given, and ought to be affirmed. For 1. he said, that the original writ was well brought, for *Judith* at the time of the suing of the original, *capias* and *testatum*, was a *feme sole*, for the assignment of error is, that she was a married woman *tempore comparationis judis*, &c. Then when a writ is well sued out, a defendant or tenant cannot by his own act abate the plaintiff or demandant's writ. *Litt. sect. 410. Co. Lit. 248. b.* And though *Judith* might marry, she could not defeat the plaintiff's writ thereby. 2. She has pleaded as a *feme sole*, at *praedicta Juditha King* who was arrested by the name of *Judith Parnell*. Now the *praedicta* makes that ill pleading, for she confesses herself the same person, and a *feme sole*; for which purpose he cited 1 *Lutw.* 22, 23. 2 *Cro.* 482. 2 *Rel. Rep.* 56. 88. *Fortescue v. Sir John Markham*. 3. He insisted that *Edward King* was estopped by the recognizance he entred into, to assign this for error, he having entred into the recognizance for *Judith's* appearance as a *feme sole*.

But the court were of opinion, that since the writ was sued out right at first against *Judith* as a *feme sole*, she could not by her own act defeat the plaintiff's writ. And therefore this case was plainly distinguishable from the cases cited out of *Brook and Re. Abr.* for there the defendant was a *feme covert* at the suing of the writ; but here she was at that time and after a *feme sole*. And in 2 *Rel. Rep.* 53. *Mich. 16 Jac. 1. Haydon v. Miller*, because it did not sufficiently appear to the court, that she was *covert* at the time of the original process sued out, which ought to be expressly averred in the assignment of the error, judgment was there affirmed; which was a case of the like nature as this. And the court affirmed this judgment July 5. 1728.

The King *vers.* Mr. Gumley et al'.

S. C. Str. 322. 1 Barnard. B. R. 74.

If a writ is made returnable on the octave, &c. of another day, that day shall be included in the computation.

AN information was exhibited against the defendants, for a great assault, battery and wounding, committed by them upon *Wilkins* the printer, &c. And on not guilty pleaded, it was tried before me at *Guildhall*, and the defendants were found guilty. And Mr. *Fazakerley* and Mr. *Bootle* moved in arrest of judgment, that the *distringas* was returnable *die Martis proximo post quindenam Trinitatis*; and the day of *nisi prius* was *die Lunae proximo post quindenam Trinitatis*; that *Trinity Sunday* was *June* the 16th, and that *etab. Trinitatis* was the *Monday* seven-night after, which was the 25th of *June*, and that the *quindenam Trinitatis* was the *Monday* fortnight after *Trinity Sunday*; which was the 1st of *July*; then the *dies Lunae proximo post quindenam Trinitatis* would be 8 *July*. But the *distringas* was returnable *die Martis proximo post quindenam Trinitatis*, which was *July* 2. and by consequence the day in bank was before the day of *nisi prius*; and therefore that this trial being had 1 *July*, which was before the day of *nisi prius*, and in truth was the *quindenam Trinitatis*, that therefore the trial was without authority, and the verdict ought to be set aside. And they cited 33 H. 6. 45. and *Dier*, 97. that a verdict taken after the day in bank was ill. But the court was of opinion, that *Sunday* the 30th was the *quindenam Trinitatis*, and the return day; for all *quindenam's etab. &c.* are inclusive; and then *die Lunae proximo post quindenam Trinitatis* was *July* 1. and the trial right. *Salk.* 626. *Harvey* against *Broad*, and *Davies v. Salter.* *Shower* 60. *Whitmore v. manucaptors of Wheeler*, adjudged in point. 6 *Mod.* 148. 159. 250. And the exception was over-ruled, *July* 10, 1728.

Wyat *vers.* Wingford.

S. C. Str. 320. (a) 1 Barnard. B. R. 45. 67.

An attachment may be granted against a man who is subpoena'd as a witness in a cause for not attending the trial. Vide *Stephenfon v. Brookes*, 2 Barnes, 27. Bl. 36. Str. 1054. 1153. 1 H. Bl. 49.

MR. *Gapper* moved last *Easter* term for an attachment against *Rolf Bailly*, for not attending at the assizes at *Winchester*, to give his evidence, to prove the hand of a steward of a manor to a copy of a court-roll, being *subpoenad* and having received one guinea for his charges, and being promised to have one guinea *per diem* while there, and his charges paid. And a rule was made, to shew cause, &c. And now 2 *July* in this term serjeant *Baines* moved to discharge the rule, for that an attachment ought not to go, but the party injured had his action upon the statute of 5 *Edw. c. 9. s. 12.* And he said, that such a rule had been granted by the king's bench between *Hammond* and *Stewart*; but

(a) In the report in 1 Barnard, the reason Bailly assigned for his nonattendance is set forth.

on showing cause, the rule was afterwards discharged. And he said also, that such a rule was granted against one *Jos. Rossington, Mich. 10 Geo. Nov. 28.* between *Dalison* and *Aland*, for not appearing at *Guildhall* before lord chief baron *Mountagu*, being *subpoenaed* as a witness; but that rule was after discharged. But the court in this case thought it was a good foundation for an attachment, the disobedience to the *subpoena* being a contempt to the court; and though an action might be brought on the statute, yet that was a more dilatory method, and more difficult to proceed in, which encouraged witnesses not attending frequently upon the trials, at which they were *subpoenaed* to appear and give evidence. And therefore the rule was made absolute, *July 2.* The original rule was granted *May 21, 1728.*

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v.
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John Harrison *vers.* Thomas Bottomley.
Error. C. B.

S. C. Str. 809. 1 Barnard. B. R. 47. 50. 65.

Intr. Pasch.
13 Geo. C. B.
Rot. 582. and
Pasch. 1 Geo. 2.
B. R.

Harrison brought an action of *trover* against *Bottomley* in the common pleas, and among other things declared for *una parcella segestrium involuorum et funium, Anglice* pack-cloths, wrappers and cords, &c. and the defendant having let judgment go by *nihil dicit*, a writ of inquiry was executed, and intire damages found for the plaintiff, and final judgment given for him in the common pleas. Upon which *Bottomley* sued this writ of error, returnable in the king's bench. And the error assigned was, that *parcella* was too uncertain a description, that no body could tell what quantity was meant thereby; and to prove it several cases were cited. *Cro. Eliz. 865. Granvel v. Rbobotham.* In *trover de una parcella piscium, Anglice* ling, after verdict the judgment was reversed, because *parcella* was an uncertain description. *2 Lev. 176. Hicks v. Pendarvis, trover de quadam parcella lintea,* judgment after verdict was arrested for the incertainty. So in *2 Lrv. 295. Wade v. Hatcher,* trespass for taking *unam parcellam pensarum laniarum, Anglice* a quantity of linen yarn, judgment stayed after verdict for the plaintiff. And a case was cited to have been in this court, *Trin. 1 Geo. Kampster v. Nelson,* where a replevin brought *pro parcella panni lintei* was adjudged not to lie for the incertainty.

In trover for a parcel of pack-cloths, wrappers, and cords, no objection can be taken on account of the uncertainty of the word "parcel," after judgment by default. Vide ante 191. 991.

Mr. Lee for the defendant in error said, the case of *Kampster* was intirely different, for there was to be judgment for a return of the thing itself; but this action being only to recover damages, it was certain enough. And so it was held, *Stiles 199. Graves v. Drake, trover pro sex parcellis plumbi cinerei, Anglice* pewter porringers; where it was adjudged good. And *1 Lrv. 303. Jenny v. Norris,* where it

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it was adjudged, that a *quantum meruit pro quadam parcella* *fit* was good, and it was held, so it would be in *trover*, damages only being to be recovered, for finding which the jury had proof before them. After consideration of the cases, the court were of opinion, that parcel should be looked on as an entire thing, the same as a bundle; and therefore affirmed the judgment, *July* the second, 1728. There was another case between *Whits* and *Graham*, *Str.* 827. upon a writ of error brought to reverse a judgment in *trover* for a parcel of diamonds, among several other things; and the same exception was taken, and judgment was affirmed, *Hil.* 2 *Geo.* 2. *Feb.* 7, 1718. which was entred *Pascbas* 1 *Geo.* 2. *C. B. Rot.* 434. and in *B. R. M.* 2 *Geo.* 2. *Rot.*

Intr. Hil. 1 G. 2.
B. R. Rot. 169,
or 164.

John Watkins *vers.* Walter West and William West.

S. C. 1 Barnard. B. R. 49, 50, 70.

A bailiff of a
horo' court is
not necessarily
a bailiff of the
horo'.
If an officer ju-
stices as such
under process,
he must shew
that he was au-
thorised to exe-
cute it by it's
direction.

IN trespass for taking the plaintiff's goods, and carry-
ing them away; the defendants pleaded, that the town
of *Ufke* in the county of *Monmouth* is an ancient borough;
that there had been there from time out of mind a court of
record held *coram praeposito ejusdem burgi pro tempore existens*
of all personal actions arising within the said borough, and
that before the time when, &c. at the said court of record
held at the said borough *secundum consuetudinem et usum ejus-
dem burgi* 23 *Apr.* 12 *Geo.* 1. before the then provost, one
Anne Hughes levied a plaint in trespass upon the case against
the plaintiff *Watkins*, &c. and then and there prayed pro-
cess against the plaintiff, &c. *ideo* then and there at the
same court, &c. there issued out of the said court, accord-
ing to the custom aforesaid, a certain precept in writing to
the bailiffs of the said borough directed, whereby by the said
court *praecceptum fuit xistum ballivis ministris distas coram
existensibus et eorum cuilibet, quod attacherent seu aliquis coram
attacheret praedictum the plaintiff per bona et catalla sua infra
burgum praedictum*, so that he should appear at the next court
to be held the 26th of *April* to answer the said *Anne*:
which precept was afterwards and before the return, viz.
the said 23d of *April*, delivered by the said *Anne* at the
borough aforesaid, within the jurisdiction of the said court,
to the defendants *ad tunc ballivis curiae illius existentibus in
forma juris exequendum*, by virtue of which precept the said
defendants then bailiffs and officers of the said court being at
the request of the said *Anne* then and there made, afterwards
and before the return of the precept, *seizet* the said 23d of
April, at the borough aforesaid, and within the jurisdiction
of the said court, the said plaintiff by his goods in the de-
claration

E
verdict
writ o
Vol

WATKINS
v.
WEST.

clatation mentioned did attach, to be at the then next court of the said borough to be held at the said borough the said 26th of April, to answer the said *Anne, &c.* and took and carried away the said goods, and detained them, with intent to redeliver them to the said plaintiff upon his appearance in the said court at the return of the said precept, to answer the said *Anne, &c.* and that they returned the precept to the then next court, *&c.* which was the same taking and carrying away of the goods, *&c.* and traverse the taking, *&c.* the day laid in the declaration, or at any time before the issuing, or after the return of that precept, *&c.* The plaintiff demurred to the plea, and the defendant joined in demurrer. And judgment was given for the plaintiff, that the plea was ill, because the justification is under a precept directed to the bailiffs of the borough, being officers of the court; but the defendants aver, that they were bailiffs of the borough; and if they were not, though they might be bailiffs of the court and officers of the court, yet the precept was not directed to them, and then they could not execute it, nor justify under it. For there might be both bailiffs of the borough, and also bailiffs of the court, distinct officers; but the precept was only directed to the bailiffs of the borough, but it was not directed to the bailiffs of the court, nor to the officers of the court, July 5, 1728. I cited the case of *Britton v. Cole*, adjudged *Hil. 9 Wil. 3. B. R. 1697. ante 305.* where in trespass for taking sheep, *&c.* the defendant pleaded, that a *levari facias* issued out of the exchequer directed to the sheriff of Gloucester, to levy issues and profits of lands found in an inquisition upon an outlawry against *Cresset* at the defendant's suit, by virtue of which writ the sheriff made a precept to *Anthony and Joseph Powell*, commanding them to levy, and that the defendant requested *Anthony and Joseph Powell* to take the cattle in the declaration, because they were *levant and couchant* upon the land, *super quo John Powell and Joseph Powell* took the cattle, *&c.* held that *John Powell* could not justify executing the process, he not being named in the warrant, but a mere stranger.

Canning vers. Wright. Error. C. B.

S. C. Str. 807. 1 Barnard. B. R. 62, 63.

ERROR was brought by *Canning* to reverse a judgment given against him in the common pleas, after verdict in ejectment, wherein he was defendant. The writ of error was *teste 23 October 12 Geo. 1.* and returnable *Radis Martini Mich. term 12 Geo. 1.* And by the record

Int. Mich. 1
Geo. 1. B. R.
Rot. 389.

A writ of error will not remove a judgment given after the term of which the writ of error was returnable R. etc. ante 1179.

Vide Str. 834, 891. 1 T. R. 230. Tho' such a judgment is certified on a writ of error, the court cannot alter the writ of error so as to make the removal good.

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certified the judgment appeared not to be given till *Hil.* term following, 12 *Geo.* 1. whereupon it was held clearly, the record was not well removed by this writ of error. Then Mr. *Parker* for the plaintiff in error moved, that the writ of error might be amended by the statute of 5 *G.* 1. c. 13. But upon reading the statute, we were clear of opinion, it could not be done, for it would be to amend the writ contrary to the truth of the case, for the judgment in fact was not given till *Hil.* term 12 *Geo.* 1. and therefore this was not such a variance as was intended to be amended by that act. The motion for an amendment was denied, July 2, 1728. See 1 *Siderf.* 104.

Elkins vers. Paine.

The name of one of several persons against whom a judgment is given cannot be inserted in the writ by way of amendment.

ELKINS recovered judgment in a *scire facias* against *Paine*, *Field*, and two others, in the *Marshalsea*, as bail for one *Crosby*; and *Paine* and *Field* only brought a writ of error, which (a) was ill, and the (b) record not removed thereby. Mr. *Parker* moved, that this writ of error might be amended by virtue of the statute of 5 *G.* 1. c. 13. But the court held, the writ was not amendable, the other defendants not having joined in the writ of error. And the writ of error was quashed. *Intr. Hil.* 1 *Geo.* 2. *B. R. Rot.*

(a) R. acc. ante 1403. and see the books there cited. (b) Vide ante 1403. and the books there cited.

Intr. Pasch. 11
Geo. 1. *C. B.*
Rot. 417. et
Intr. Trin. 2
Geo. 2. *B. R.*
Rot.

Jacob Lopes Henriques, *Judah Senior Henriques*, *Isaac Senior Henriques*, *William Hubbard*, and *Charles Nelson*, against the general privileged Dutch company trading to the West Indies.

The warrant of attorney in a cause may be entered of the term the placita is of, tho' the record imports that the parties appeared by their attorneys of a preceding term. *S. C. Str.* 807. vide *Fitzg.* 191.

No damages are recoverable upon a *scire facias*. *S. C. Str.* 807. *D.*

acc. *Burr.* 1791. If there are two distinct judgments upon a record, one of them may be reversed by error, and the other affirmed. *S. C. Str.* 807. *R. acc.* ante 891. *Str.* 188, 971. *D. acc.* *Burr.* 1791. See vide ante 870. In error on a *scire facias* upon a recognisance of bail the plaintiff cannot object that the defendant could not take the recognisance or sue. A foreign corporation may sue in their corporate name here. *S. C.* much more at large *Str.* 612.

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scire feci, the plaintiffs in error appeared by William Gilbert their attorney, and imparled to the first return of *Easter* term then next; and then pleaded, there was no record of any such recognisance as was set out in the *scire facias*. To which the company replied, that there was such a record. Whereupon judgment was given by the court of common pleas, that there is such a record, and judgment was, that the said company should have execution against the said plaintiffs in error severally for the said several sums of 20000*l.* by them severally acknowledged; *consideratum est etiam*, that the said company recover against the plaintiffs in error 6*l.* 10*s.* *pro damnis misis et custagiis suis quas sustinuerunt occasione dilationis executionis praedictae*, to the said company *ad requisitionem suam per curiam hic adjudicata juxta formam statuti, &c.* Upon this writ Mr. Strange counsel for the plaintiffs in error insisted upon two errors. The first was, that the plaintiffs in error had among others assigned want of warrants of attorney on record, and upon a *certiorari* directed to the chief justice of the common pleas he had certified there were no warrants of attorney of *Hilary* and *Easter* terms in the 11th year of the late king, but the defendants in error having suggested, that there were warrants of attorney of *Easter* term in the 11th year of the late king, another *certiorari* was granted to the chief justice of the common pleas, &c. to which he had returned warrants of attorney in this cause both by the plaintiffs and defendants of *Easter* term in the eleventh of the late king. But Mr. Strange insisted, those were not good warrants, because they were warrants of *Easter* term, whereas the *scire facias* was returnable *octabis purificationis* in *Hil.* term, at which day the plaintiff below came by his said attorney, but the warrant returned is a warrant of *Easter* term following, which could not be a warrant to appear the *Hilary* term before. To which it was answered by Mr. Reeve for the defendants in error, that a warrant of attorney might have been entered at any time before judgment. 41 *Ed.* 3. 1. *b.* 1 *Roll. Abr. tit. Attorney I.* But by the 32 *H.* 8. c. 30. *f.* 2. attorneys are to enter their warrants of record of the same term the issue is entered on record; and by the 18th of *E.* c. 14. attorneys are to deliver in their warrants to be entered or filed on record, in such manner and form as theretofore by the laws or statutes they ought to have done. And the statute of 4 *Ann* c. 16. gives no direction when the warrants of attorney are to be filed; but only says, so that there be warrants of attorney duly filed according to the law as is now used. And in the present case the warrant of attorney is entered of the same term the *placita* is of, *Easter* term 11 *Geo.* 1. And he cited a case in this court adjudged *Trin.* 8 *Geo.* 1. between *Nake* and *Caldicot, Str.* 526; where in error upon a judgment of the common pleas want of a warrant of attorney was assigned for error, and a warrant was returned upon a *certiorari* directed to the

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chief justice of the common pleas of a term subsequent to the *pacito*; and it was held to be no error. And the court were unanimously of opinion, that this was no error in the present case, for the reasons given by Mr. *Roror*.

Then Mr. *Strange* assigned his other error, which was, that by 8th 9th W. 3. c. 10. s. 3. costs of suit are only given to the plaintiff in a *scire facias*, if he obtains judgment or an award of execution against the defendant after plea pleaded, or demurrer joined. But in this case the court of common pleas have given judgment, that the plaintiff shall recover against the defendant 6 l. 10 s. *pro damnis missis et custagiis suis occasione dilationis executionis*, &c. whereas they have no power to give damages for the delay of the execution. To which Mr. *Roror* offered as an answer, that the damages occasioned by the delay of execution were the costs and charges the plaintiff was put to in suing the *scire facias*, and by consequence were his costs of the suit; and that the word *damna* imported in this case no more. 2. He said, that the judgment was for two distinct things, one an award of execution of a *scire facias*, for the sum contained in the recognisance, and the other for these *damna*; and therefore if the last was erroneous, that part of the judgment for the 6 l. 10 s. might be reversed, but the award of execution should be confirmed. And for that he cited a case between *Green and Waller*, intr. Hil. 13 W. 3. B. R. Rpt. 20. ant. 891. where in a writ of error brought here to reverse a judgment of the king's bench in *Ireland*, which affirmed a judgment of the common pleas in *Ireland*, in debt upon a bond; and upon a demurrer after special pleading, the judgment of the king's bench affirmed the judgment of the common pleas in *Ireland*, and farther gave costs upon the affirmance; and as to that part of the judgment as to costs, the entry was, *consideratum est quod* the plaintiff in the original action *recuperaret* instead of *recuperaret*, which was held error: the court of king's bench here affirmed the judgment of the king's bench in *Ireland*, which affirmed the judgment of the common pleas there, and reversed the judgment of the king's bench in *Ireland* which gave the costs. And the court were all of opinion, that the judgment as to the 6 l. 10 s. *pro damnis missis et custagiis* was erroneous, and therefore they reversed the judgment as to that, and affirmed the judgment as to the adjudication of execution, and awarded execution, against the several plaintiffs in error, only for the sums in the recognisance. July 5. 1728.

Afterwards these plaintiffs in error brought a writ of error in parliament upon this judgment given by the court of king's bench, which was heard by the house of lords April 25, 1730. And besides the errors insisted on in the king's bench, the plaintiffs in error by their counsel, Mr. *Boyle* and Mr. *Wynne* insisted, that no recognisance in *England* could be given to this *generalis privilegiata societas Belgica*

ad Indos Occidentales negotians, for that the law of *England* does not take notice of any foreign corporation, nor can any foreign corporation in their corporate name and capacity maintain any action at common law in this kingdom, and that therefore the recognisance was void in law. 2. They insisted, that if any such recognisance could be acknowledged to this pretended company, yet no suit could be upon it here, without setting out the proper names of the persons concerned, who make the company, and how constituted or privileged, and alleging the recognisance to be entered into by them *per nomen* of such a company. And if judgment had been for the plaintiffs in error against this pretended company, the plaintiffs could not have levied their costs upon them. But to this it was answered by Mr. Reeve and Mr. Fazakerley for the company, that the plaintiffs were estopped by their recognisance, to say there was no such company. And where an action is brought by a corporation, they need not shew how they were incorporated; for if the name is proper for a corporation, they need not shew how they were incorporated, because the name argues a corporation; but upon the general issue pleaded by the defendant the plaintiffs must prove they are a corporation. *Hob. 211. Norris v. Stapps.* And the judgment of the king's bench was affirmed by the house of lords, *Saturday, April 25, 1730.* and the plaintiffs in error ordered to pay 100*l.* costs.

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Note, the original action brought by this company against Jacob Senior Henriques Van Moyses was an action upon the case upon several promises, *viz.* for money lent, &c. and *non assumpsit* pleaded. The cause was tried before lord chief justice King at *nisi prius* in the common pleas, *Michaëlmass* term 1734. upon which trial the case appeared to be, that Jacob Senior Henriques Van Moyses became indebted to the company in 180,000 guilders, amounting to about 17,390*l.* sterling, for so much borrowed of them in the bank of *Amsterdam*, and obliged himself by contract to repay the same with interest; and for further securing thereof, he pledged to the company several shares of *West India* stock, which upon his absconding were sold by decree of the court of *Schepens* for 60,900 guilders, toward satisfaction of the debt and interest. And for the rest of the money borrowed this action was brought. And upon the trial, lord chancellor King told me, he made the plaintiffs give in evidence the proper instruments whereby by the law of *Holland* they were effectually created a corporation there. And after hearing the objections made by the counsel for Jacob Senior Henriques Van Moyses, he directed the jury to find for the plaintiffs; who accordingly did, and gave them 13,720*l.* damages. And afterwards a motion was made in the common pleas to set aside the verdict, but by the unanimous opinion of that court the motion was denied.

Michaelmas Term

2 Georgii 2. regis, B. R. 1728.

Intr. Pasch. 1
Geo. 2. B. R.
Rot. et intr.
Mich. 1 Geo. 2.
C. B. Rot. 879.

Robert Moore Esq. and the lady Anne his wife, against George Jones Esq.

S. C. Str. 314. 1 Barnard. B. R. 61, 85.

An action of covenant cannot be maintained except upon a deed, and the declaration must shew that it is brought on one.

An allegation that a party concessit per quoddam scriptum factum apud A. does not imply that the writing was a deed. Nor does an allegation that the party covenanted per quoddam scriptum.

Words in an instrument importing that J. B. signed and sealed it do not furnish a ground for inferring that he did.

RObert Moore and the lady Anne his wife brought a writ of error returnable in the king's bench, upon a judgment given against them in the common pleas, in an action of covenant brought against them by George Jones, esq. in which the plaintiff Jones declared *quod cum per quoddam scriptum factum apud Westmonasterium* (the action being laid in Middlesex) in comitatu prædicto, 6th of December 1715, by which writing, &c. Anne countess dowager of Sussex, Charles Skelton, esq. and lady Barbara his wife, and the said Anne wife of the said Robert Moore, by the name of the honorable the lady Anne Leonard, granted to the said George Jones, *pro ejus consilio tunc impenso et impofterum impendendo* to the said countess of Sussex, and Charles, and lady Barbara his wife, and the said lady Anne 50*l.* to the said George and his assigns, *exinde tunc* for and during the natural life of the said George, if the said countess of Sussex, and Charles, and lady Barbara his wife, and lady Anne, or any of them should so long live, payable half-yearly, &c. then the declaration sets out a joint and several covenant from the said countess, Charles Skelton and lady Anne, for the payment of the said annuity, and assigns a breach in non-payment of several half-yearly payments of the said annuity, *ad damnum* of the plaintiff Jones 300*l.* Upon oyer prayed by the defendants *scripti in narratione prædicti Georgii mentionati*, the writing is set out *in hæc verba*, which imported a grant of an annuity as set out in the declaration, and concludes, in witness whereof we have hereunto set our hands and seals the 6th

6th of December, 1715. After *oyer* of which writing the defendants pleaded in bar, that the plaintiff *George* after the 29th of September 1723 (for non payment of arrears of the annuity incurred after the day of the breach being assigned) to any of the said parties, *consilium non impendit*. To which plea the plaintiff *George* demurred generally. After which the record goes on, *super quo praedicti Robertus et Anna, licet solemniter exacti, ad jungendum in moratione in lege cum praefato Georgio non veniunt, sed defaultam fecere; ob quod, &c.* an interlocutory judgment was given for the plaintiff *Jones* and a writ of inquiry awarded and executed, and damages found, 250*l.* &c. and final judgment given for the plaintiff. Upon which this writ of error was brought. And three errors were insisted upon by the counsel for the plaintiffs in error.

The first was, that it did not appear by the declaration, that the writing mentioned in the declaration was the deed of the defendant, &c. for if it was not, an action of covenant could not be maintained upon it.

2. That the breaches were ill assigned for the non-payment of the annuity, which were assigned in this manner, *viz. quod praedicta comitissa Suffex, Carolus et domina Barbara uxor ejus, et praedicta domina Anna dum ipsa sola fuit, et praedicti Robertus et domina Anna post sponsalia inter eos celebrata, non satisfecerunt sive solverunt, nec eorum aliquis satisfecit sive solvit, neque eorum aliquis causavit satisfieri sive solvi, eidem Georgio sive assignatis suis summam viginti quinque librarum de praedicta annuitate quinquaginta librarum eidem Georgio debitam super vicissimum quintum diem Martii anno Domini 1723.* and so in the same manner alleges the non-payment of several subsequent half-yearly payments, &c.

3. The third error was, that the reason of the judgment of the common pleas was, because the plaintiff in error and defendant below did not join in demurrer, and yet judgment was given against him, as upon default, which could be only when a day was given; but no day was given him here, and therefore the judgment should rather have been entered as upon a *nihil dicit*.

This case was argued three several times, by Mr. Filmer, Mr. Wynne and Mr. Robinson, for the plaintiffs in error, and by Mr. Reeve, Mr. serjeant Chapple and Mr. Hufsey, for the defendant in error. And the counsel for the plaintiffs in error insisted upon it, that it could not be disputed, but that an action of covenant must be grounded on a deed; that in this case the writing mentioned in the declaration did not appear to be a deed, for it was neither mentioned to be sealed, nor any technical word used in the

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declaration that imported a deed, as *factum*, *indenturam*, &c. and they relied upon the case of *Southwell v. Brown*, Trin. 30 Eliz. B. R. Cro. Eliz. 571. where in covenant the plaintiff declared, that the defendant *per scriptum articulo*, made between the defendant on the one part and the plaintiff on the other, *convenit*, &c. and after verdict for the plaintiff, the declaration was adjudged to be ill, because it was not alleged, that the writing was *sigillo defendantis sigillatum*. But if the word *factum* had been instead of *scriptum*, or it had been *scriptum factum*, it might have been good. So in 3 Lev. 234. *Blenherghes v. Pearson*; in defeasance of a condition of a bond the defendant pleaded, that the plaintiff *per scriptum suum sub manu sua signatum* agreed to enlarge the time of payment of the money comprised in the condition; and it was adjudged, the plea was ill, because this writing set out in the plea did not import a deed, but the defeasance must be by deed.

On the other side it was argued by the counsel for the defendant in error, that it sufficiently appeared by this declaration, that the writing upon which the plaintiff declared must be took to be a deed, and should be so intended to be by the court; that delivery of the deed is essential to the essence of a deed, and yet there is no occasion to aver in the declaration, it was delivered. That to declare that *J. S. per scriptum suum obligatorium*, without saying *sigillo suo sigillatum*, *concessit se teneri*, &c. is good. Cro. Eliz. 747. *Pearson v. Hodges*, Cro. Jac. 420. *Ashmole v. Ropley*. 1 Vent. 70. *Green v. Cubit*. Yet in propriety of expression that does not import it was a deed, but may equally be true of a promissory note, which may be said to oblige the party who signs it to a performance of it. So to declare, *J. S. per factum*, &c. without saying, *factum*, or *factum suum sigillatum*, is good, cited by Houghton Justice, 2 Ro. Rep. 228. in *Heaton and Wolf's case*. Or to say, that *J. S. per indenturam convenit* without saying *sigillo suo sigillatum*, is (a) good. 4 Leon. 175. Sir Francis Englefield's case. The same *per indenturam suam demisit*, 4 Ann. B. R. *Vivian v. Campion*, ante 1125. All which cases were agreed by the court to be law, because *factum* and *indentura* are terms of art, which import a deed; and so of *scriptum obligatorium*, 'tis a proper word for a bond. And the constant course of the common pleas is to declare in that manner upon a bond.

(a) Vide 2 Vent.
307.

The next thing the defendant in error's counsel insisted on was, that the word *factum* was in the declaration, and it was agreed in the case before cited, Cro. Eliz. 571. that if the word *factum* had been in the declaration, it had been good. But so that it was answered by the court, that *factum* in this case was not inserted in the declaration as a substantive importing a deed, but it was only to introduce the

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place where it was made, for it was *scriptum factum apud Westmonasterium*, and therefore could not make it good. If otherwise it would be ill. Then the defendant in error's counsel argued, that the declaration was good, because it was an action of covenant; and the word *convenit* imports, that it must be by deed, for a covenant cannot be but by deed. In the Register the writ is, *quod teneat ei conventionem* not mentioning any deed. In 1 Sid. 375. in covenant the declaration was *per quoddam scriptum testatum existit*, that the defendant covenanted, and it was there held good. So in 1 Lutw. 333. *Althorib v. Hutchinson*, exception was, that the writing containing the covenant was not said to be *sigillo suo sigillatum*; sed non allegatur, says the book; for *per curiam* it is said, the defendant thereby covenanted, which could not be, unless it was a deed. To which it was answered by the court, that a writ sets out the matter shortly, and is called *breve*, quia breviter intentionem proferentis explanat. 1 Inst. 17. q. 73. b. But the declaration must be (as Coke expresses it, Co. Lit. 17.) more narrative and spacious, and certain both in matter and circumstance of time and place, &c. and though the writ is, *quod teneat conventionem*, yet no instance can be shown, where a declaration setting out that the defendant *convenit* generally to do such an act, &c. has been held good. Nor can it be so, for the defendant to an action of covenant may plead, *non est factum*; which is the general issue; but that plea he cannot plead, if no deed is set out in the declaration. And as to the case in 1 Sid. 375. *Stowson v. Stevensen*, the exception was, that there was no precise affirmation, for it was *per quoddam scriptum per quod testatum existit*; and the court held, it was all one as if it had been *per quoddam scriptum testatum existit*, which had been held good; that is in respect of the setting it out with a *testatum existit*, which appears from the exception that it was not a precise affirmation: but it don't appear by that book, but that *sigillo sigillatum* was in the declaration; nor no exception took, that that was omitted; and therefore that case is no authority as to the present question. As to the case 1 Lut. 333. it was answered by the court, that it appears by the declaration as set out in the entry, page 330. that the writing was sealed by the defendant; for it is, that the defendant *per quoddam scriptum, quod* the plaintiff *sigillo suo signatum hic in curia profert*, &c. However the case in Cro. Eliz. 571. is otherwise, that such a declaration as this is ill; upon which authority the court relied; and held therefore, that nothing before insisted upon by the counsel for the defendant in error had answered the exception took by the counsel for the plaintiff in error.

Then

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Then the counsel for the defendant in error insisted, that this fault was helped by the setting out the instrument in *hanc verba* upon the *oyer* prayed; for the writing set out on the *oyer* concludes, in witness whereof we have hereunto set our hands and seals 6 December 1715. so that thereby it appears, this writing was sealed by the defendant, and that by the declaration. For when *oyer* is prayed of a bond, and it is set out, it becomes part of the plaintiff's declaration. *Carthw.* 301. *Abney and Hedges* Sheriffs of London against *Whits*. The plaintiffs brought an action upon a bail-bond, and did not shew it was entered into to them by the name of sheriffs, the defendant prayed *oyer* of the bond generally, and of the condition, and made the entry in the usual form, viz. *petit auditum scripti obligatorii praeiacti et i legitur, &c. petit etiam auditum conditionis scripti illius, et i legitur in hanc verba*; then the defendant pleaded the statute of *H. 6.* and that the bond was given for ease and favour, &c. the plaintiffs entred upon the record the defendants praying *oyer* of the bond, &c. and then set forth the bond itself as well as the condition, *et petunt quod scriptum praedictum irrotuletur in hanc verba*, by which it appeared, the bond was took by the name of sheriffs of London, and then replied and traversed, that it was took for ease and favour; and upon demurrer held *per curiam*, the plaintiffs had avoided the defendant's plea of the statute, because now it appeared upon the record, that the bond was took by the plaintiffs by the name of sheriffs. And by *Holt* chief justice, *Carthw.* 513. if the defendant prays *oyer* of a bond and condition, and it is entred in *hanc verba*, it is parcel of the plaintiff's declaration, and not of the defendant's plea. And they relied much upon the case, *Cro. Car.* 209. *Sir William Courtney v. Sir Richard Greenville*. Error upon a judgment in the common pleas in debt; the plaintiff declared, that the defendant 18 May 4 Car. concessit se teneri to the plaintiff in 280*l.* solvendis, &c. et profert hic in curia scriptum praedictum quod debitum praedictum testatur, &c. the defendant demands *oyer conditionis scripti obligatorii praeiacti*, which being read, he pleaded payment; And after issue thereupon, judgment for the plaintiff; exception was took, that it is not said, *quod per scriptum obligatorium concessit*; but *per curiam*, because the plaintiff shewed the writing, whereby he demanded the debt, and the defendant by his plea shews it was an obligation with a condition, and issue is took thereupon, and found for the plaintiff; the declaration is good enough; at least it appears to the court, the plaintiff hath a just debt, and good cause to recover; and judgment was affirmed.

But

But the court were unanimous of opinion, that the defect in the declaration was not made good by the entry of the instrument *in hac verba* upon the *oyer* prayed; for though the instrument says, in witness whereof we have set our hands and seals; yet that does not shew the deed was actually sealed, for sealing is a fact which ought to be positively averred, or else something should be in the declaration which necessarily imports it was sealed; and therefore this is not like the case in *Carthew* 301. for there it did appear by setting out the bond upon the *oyer*, that it was entered into to the plaintiffs *per nomina vicecomitum civitatis London*: nor does the case in *Cro. Car.* 209. come up to this case, for there the defendant by praying *oyer conditionis scripti obligatorii praedicti*, admits it to be a bond. And therefore the court held, the declaration was ill, and judgment was reversed *November* 12, 1728. As to the other exceptions, the court gave no absolute opinion.

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Smith *vers.* Mason.

S. C. Str. 316.

Intr. Mich.
2 Geo. 2. B. R.
Rot.

IN case upon a promissory note, the defendant was sued by original by the addition of a gentleman; and he pleaded in abatement, that he is, and at the time of suing the original and long before was, a merchant residing and trading within the city of *London*, *absque hoc quod die impetrationis praedicti brevis originalis* of the plaintiff *vel antea vel postea fuit generosus, &c.* And upon demurrer it was adjudged, the defendant should answer over, because by the statute of additions, 1 H. 5. c. 5. the plaintiff may sue the defendant either according to his addition of degree or mystery; and this writ being brought by the addition of his degree, he ought to have shewed, what degree he was of, to shew the plaintiff might have a better writ, *November* 14, 1728. The like point was adjudged, *Pasch.* 8 Geo. 1. B. R. *Mason v. Russell*, where the defendant being sued as yeoman, he pleaded he was a hornier, and traversed that he was a yeoman; and judgment was given *quod respondent ulterius*. Same point adjudged *Trin.* 9 Geo. 1. B. R. *Horspoole v. Harrison*. Str. 556.

A plea in abatement must shew how the plaintiff should have sued. R. acc. ante 1178. *Turton v. Worley*, B. R. M. 24 G. 3. Adm. Ann. 236. Bl. 21. acc. 3 Bl. Com. 302. A defendant may be sued under the statute. 'Tis sufficient under the statute of additions to sue a man either by the addition of his mystery or by the addition of his degree. A plea in abatement for misprision of the defendant only is bad. R.

defendant's degree, must shew of what degree he is. A plea shewing his mystery only is bad. R. 371.

Intr. Mich.
2 Geo. 2. B. R.
Rot. intr.

Pasch. 1 Geo. 2.
C. B. Rot. 717.

The courts will
take notice of
the custom of
merchants. vide
ante 88.

Upon stating a
bill of exchange
'tis not necessary
to aver that it
was made ac-
cording to the
custom of the
merchants. vide
ante 88. Bayley
55.

At least no ob-
jection can be
made on account
of the omission
if it is afterwards
stated that any
person by virtue
thereof accord-
ing to the cus-
tom of mer-
chants became
liable, &c.

An allegation
that a man made
a bill of ex-
change and
thereby requested
another to pay
it implies that
he signed it.
vide ante 1376,
2484.

'Tis never ne-
cessary to aver
that the accep-
tance of a bill of
exchange was in
writing. S. C.
Str. 817. vide
An. 74. Str.
1000. 2 Will. 9.
Burr. 1672.
1 T. R. 185.

No objection
can be taken to
a bill of ex-
change because
it imports to be
given pro valore
in the hands of
the drawee de de-
nariis accommodatis de the drawer.

Sir John Erskine *vers.* Murray. Error C. B.

William Murray brought an action against the defendant Sir John Erskine upon an inland bill of exchange, wherein he declared, that he 1 March, 1727, at Westminster in the county of Middlesex, made his bill of exchange in writing, to the said Sir John directed, and by the said bill requested the said Sir John upon the 10th day of the said month of March to pay to the said William Murray, or order, at his mansion-house in Edinburgh, 200l. Sterling, *pro valore in manibus ipsius Johannis de denariis accommodatis de eodem Willielmo*; that the defendant Sir John accepted the bill, *ac ratione inde secundum consuetudinem mercatorum* became liable to pay, &c. and being so liable, promised to pay the said 200l. to the plaintiff Murray, &c. The defendant Erskine let judgment go against him by *nihil dicit*, and after execution of a writ of inquiry and final judgment given against him, he brought this writ of error.

The first exception took by Mr. Wynne and Mr. Robinson counsel for the plaintiff in error was, that it was not alleged, that the bill was drawn according to the custom of merchants.

But to this it was answered by Mr. Reeve counsel for the defendant in error, and so resolved by the court, that the law took notice of the custom of merchants, without setting it out specially; and if the bill as set out in the declaration appeared to be within the custom of merchants, it was sufficient. Besides, after setting out the bill and acceptance, it is said, *ratione inde secundum consuetudinem mercatorum* the defendant below became liable, which they held was sufficient.

2d Exception was, that it was not averred, that the bill was signed by Mr. Murray. 3d Exception was, that the defendant had not accepted the bill by under writing the same under his hand. See 9 W. 3. c. 17. and 3 & 4 Ann. c. 9. s. 4. & 5.

As to the signing, it was answered, that it is alleged, that the plaintiff made his bill of exchange in writing to the said Sir John Erskine directed, and by the said bill requested, which of necessity implies, the plaintiff's name was writ in the bill, else he could not request; and the saying he made

the bill in writing; imports he writ or somebody by his authority writ, which will be the same thing, and imports a signing, if it is necessary in case of inland bills of exchange. And such a way of declaring was held sufficient in cases of promissory notes, where the act 3 & 4 Ann. c. 9. requires, that the party who makes the bill, or some person intrusted by him, should sign it. *Mich. 7 Geo. 1. B. R. Taylor v. Dobbins, Str. 399, and Mich. 11 Geo. 1. B. R. 1724. Elliot v. Cooper, ante, 1376.*

EXCEP-
TIONS
v.
MURRAY.

The fourth and last exception was, that the bill was not laid to be for value received; but it is, *pro valore in manibus ipsius Johannis de denariis accommodatis de eodem Willielmo*, which is nonsense, for it should be *accommodatis per eundem Willielmum*, not *de eodem Willielmo*. But the court held, *pro valore in manibus ipsius Johannis* had been sufficient; and the other words might be rejected as surplusage; the court held that the meaning was, lent by the said William, though the Latin might not be so correct. And the judgment of the common pleas was affirmed. *Nov. 23d, 1728.*

George Blenkinson and William Waite *vers.* Francis Iles. *Error.*

Hil. 1 G. 2.
B. R. Rot.

THE plaintiffs brought a writ of error upon a judgment given against them in the court of the borough of *Knareborough*, in an action of trespass brought against them *vi et armis*, for breaking and entering Iles's house, and taking away his goods, after verdict. The writ of error was directed to the steward of the court of the borough of *Knareborough* in the county of *York*, and the writ of error was returned by the earl of *Burlington* as steward of that court; and the *placita* was, *in curia domini regis pro burgo de Knareborough in comitatu Eborum apud in burgo praedicto infra jurisdictionem ejusdem curiae secundum usum et consuetudinem burghi praedicti a tempore cujus contrarii memoria hominum non existit in eodem burgo usitatum et approbatum.* *Monday 22d of June 1724. coram Thesbet subsheschallo curiae ibidem.* Mr. Filmer for the plaintiff in error took exception,

Where an inferior court is held before the under steward of a court, if the *placita* states that it was held according to immemorial custom, it need not shew that the steward had power to make a deputy, or that the under steward had a deputy, as in writs.

1. That it did not appear, the under steward had power to hold the court; for the writ of error was directed to the steward, who is supposed to be the judge, and he returns the writ; and it is not said the under steward was appointed by deputation in writing from him, nor that he had power

The plaintiff in action of trespass *vi et armis* may be general in a

action of trespass. The appearance of a defendant precludes him from objecting to the propriety or regularity of the process issued to compel his appearance. *R. sec. 1 Freem. 468. Str. 1044. 1072. 1 Vent. 220. Lutw. 973. Bro. Discontinuance of process. pl. 11. Responder. pl. 12. arg. 11. 155. Cowp. 21.*

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to make a deputy. *Sed non allocatur*; for *per curiam*, that the court was held according to the custom used time out of mind, imports that by the custom the under-steward might hold the court, and there was no necessity to shew how he was appointed.

The second exception was, that the plaint was said to be *de placito transgressionis* generally, not saying whether it was trespass on the case, or *vi et armis*; which it was insisted was ill, and for that *Stiles's Rep.* 86. *Hales v. Moore* was cited, where in error upon a judgment in an inferior court, the plaint was *de placito debiti* generally, which was said to be uncertain, because the defendants could not know what was demanded, and *Bacon* justice held it a good exception, and a rule was pronounced for reversal, *nisi, &c.* *Sed non allocatur*; for the count ascertained which sort of trespass it was for, *viz. vi et armis*, and trespass *vi et armis* is an action of trespass. And as to the case of debt, in the king's bench the bills are *de placito debiti* generally.

Third exception, that the first process was a *capias*, whereas it ought to be an attachment. *1 Rol. Abr.* 780. L. 6. In debt, if a *capias* is the first process, and not a summons, though the defendant appears, and pleads to issue, and found against him, yet it is error, and not aided by the appearance, *3 & 4 Jac.* 1. *Sed non allocatur*; for *per curiam*, it is aided by the defendant's appearance. And the like case as cited before in *Rolls* was adjudged directly contrary, *11 Jac.* 1. *B. R. Inch v. Goodfield*, which was after the former case. And judgment was affirmed. *Nov.* 26, 1728.

Intr. Trin. 2
2 O. 2. B. R.
Rot. et Intr.
Trin. 12 G. 1.
C. B. Rot. 1785.

John Neale, Esq. *vers.* William Ovington.
Error. C. B.

An allegation that two persons fecit quandam notam in scriptis, & manu sua propria signavit, per quam, both of them promised, &c. does not import that either of them made the note.

An allegation that two persons made a note, and thereby jointly or severally promised to pay, &c. does not import that either of them promised severally. *S. P. Str.* 319. *R. acc. Str.* 76. *sed vide Cowp.* 832.

THE defendant in error, William Ovington, brought an action in the common pleas against the said John Neale, and declared, that the said John and Edmund Waller, Esq. 23d of Nov. 1725. fecit quandam notam suam in scriptis vocatam a promissory note, et eandem notam adiunct et ibidem cum manu sua propria signavit et per eandem notam praedicti Johanner et Edmundus conjunctim aut separatim promiserunt solvere eidem Willielmo vel ordini 1100 l. pro valore recepto per eosdem Johannem et Willielmum; by reason whereof, and by virtue of the statute, &c. the said John became separately liable to pay to the said William the said 1100 l. &c. Upon

non assumpsit pleaded, verdict and judgment was given against the said *John Neale*. Upon which he brought this writ of error. And upon argument this judgment was reversed, Nov. 26, 1728 because the note is laid to be made by two persons, Mr. *Neale* and Mr. *Waller*, and the verb is in the singular number, *fecit*, so that it don't appear to be made by Mr. *Neale*, against whom the action is brought, but might be by Mr. *Waller*, and it don't appear to make Mr. *Neale* liable by his signing. 2. The note does not import, they promised severally; for the note set out is, that they promised jointly or severally, which is not positive, they promised severally; for it ought to have been, that they promised jointly and severally. Mr. *Robinson* counsel for the plaintiff in error, and Mr. *Strange* counsel for the defendant in error.

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v.
OVINGTON.

The King against Thomas Stone.

S. C. 1 Sess. Caf. 378.

THE defendant was convicted by a justice of peace of *Dorsetshire* for killing a fallow deer of the king's in *Cranbourne Chase*; and the conviction was quashed, because the informer was the witness; divers convictions having been quashed for the same reason before. Nov. 28, 1728.

John Burchell administrator of William Burchell vers. Oliver Slocock.

Intr. Mich. 2
G. 2. B. R. Rot.

THE plaintiff brought an action on the case against the defendant upon a promissory note, wherein the plaintiff declared, that the defendant *Oliver Slocock* and one *Thomas Willisford* 24 Mar. 1725 *Ec. fecerunt quandam notam suam in scriptis, vocatam a promissory note, manibus suis propriis adinde subscriptis*, bearing date the same day and year, and delivered the said note to the intestate *Will. B.* by which note the said *Oliver* and *Thomas* conjunctim et divisim promised to the said *Will. 101 l. 12 s.* in three months after the date of the said note, *valore recepto de praemissis in vivo, vocato Rosemary Lane*, late in the possession of one *Thomas Rewer Sherwin*, *ratione quorum quidem praemissorum que non vigore statuti, &c.* And in the declaration there were other counts, but to this count the defendant demurred, and shewed for cause, that the note set out in that count is not a promissory note within the statute. And the plaintiff joined in demurrer. But the court held it clearly to be a promissory note within 3 & 4 Ann. c. 9. And judgment was given for the plaintiff. Nov. 26, 1728.

A written promise for the payment of money to *J. S.* or order for value received of the premises in *Rosemary Lane* is a negotiable note.

Upon a conviction the defendant's summons, appearance, defence, and conviction must not be stated to have happened on a day before that on which the information is alleged to have been exhibited and the witness examined.

Intr. Pasch. 1 Geo. 2. B. R. Rot. 203.

Upon stating facts to shew a man was a bankrupt, it is necessary to set forth that there was a petition. S. C. Str. 869. 1 Barn. B. R. 59. 79.

Who the petitioners were.

And that they were creditors to the amount of the sums mentioned in 5 G. 1. c. 24.

An allegation that the commission issued in due form of law is not sufficient. S. C. 1 Barnard. 3 B. R. 50. fed vide 5 G. 2. c. 30. s. 7.

A debt which is contingent at the time of the bankruptcy is not discharged by a certificate. S. C. Str. 267. R. sec. Str. 1078. 1160. Mallett 28. 79. 3 Will. 328. 348. 1 T. R. 594. 60. 795. and see Cooke's Bankrupt Laws, c. 8, 9, 1290 to 1293. see also 19 G. 2. c. 73. A debt payable if a wife shall survive her husband is contingent during the husband's life. S. C. Str. 1160. R. acc. Moseley 28. 79. Upon a bond conditioned that the heirs, executors, or administrators of the obligor, should pay a sum of money, 'tis not a good breach to state that the executors had not paid it, unless it is also stated that it still remains unpaid. S. C. Str. 869. 1 Barnard. B. R. 69.

The King against William Kent.

THE defendant was convicted for keeping a gun for destroying the game, not being qualified by law, &c. And the conviction being removed into the king's bench by *certiorari* was quashed, because the information was set out to be exhibited 2d Nov. 1 Geo. 2. and the witness was sworn and made his oath of the truth of the facts contained in the information the said 2d of Nov. 1 Geo. 2. But the summons of the defendant, his appearance, and making defence, and the conviction, was laid to be the 2d of October 1 Geo. 2. which was before the information and examination of the witness, &c.

James Tully against Francis Sparkes and Christopher May, executors of William Donalson.

THE plaintiff brought an action of debt against the defendants for 800*l.* wherein the plaintiff declared, that *William Donalson* in his life, viz. the 6th of May 1704, By his bond then dated obliged himself, his heirs, executors and administrators, to the plaintiff *Tully* and one *Philip Rulby*, whom the plaintiff survived, in the said sum of 800*l.* &c. with condition under the said bond subscribed, that if the heirs, executors or administrators, of the said *William* should pay to the said plaintiff *Tully* and *Philip*, or the survivor of them, or the executors or administrators of the survivor of them, 400*l.* within two months after the death of the said *William*, in case one *Martha Latimer* should marry the said *William*, and should happen to survive him, in trust for the benefit and behoof of the said *Martha*, her executors, administrators or assigns, then the obligation should be void, otherwise should remain in full force; and the plaintiff in fact says, that after the making the said bond, viz. the 8th of May in the same year 1704, the said *Martha* married the said *William Donalson*; and that after the said marriage, viz. the 17th of May 1727, the said *Philip Rulby* died and the plaintiff survived him; and that the said *William* the same day and year made his will, and the defendants his executors; and afterwards, viz. 3d of Jan. in the same year, the said will not being revoked, died, and the said *Martha* survived him, and is yet alive; and that after the death of the said *Willm Donalson*, viz. 10th of April 1728, the defendant *Francis* proved the said will *devisavit* for the said *Martha* and *Christopher*, or either of them, and

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not pay to the plaintiff the said 400*l.* within two months after the death of the said *William* according to the said condition, whereby the bond became forfeited; *unde actio accrevit* to the plaintiff, to demand of the said defendants the said 800*l.* but the defendants the said 800*l.* though often requested, have not yet paid, nor hath either of them paid it, &c.

The defendants after praying *oyer* of the bond and condition (which was granted) plead in bar, that the said *William Donalson* being a subject born of this kingdom after the making of the bond, *viz.* the 8th of *January* 1720, and for seven years before that time and more, and afterwards, exercised the trade of a biscuit baker, and got his living in that trade; and that he so using that trade the 8th of *January* became indebted to *R. H. G. S. J. C.* and divers other persons, in the sum of 200*l.* and more; and being so indebted, and after the 20th of *May* 1716, *viz.* the 9th of *January* 1720, his said debts not being paid, became a bankrupt, &c. and the said *William* so being a bankrupt, the 8th of *February* following a commission of bankruptcy under the great seal *debita juris forma emanavit* against him, directed to, &c. as by the said commission appears; by virtue whereof afterwards, *viz.* the first of *March* in the said year the commissioners declared him a bankrupt, &c. and that he surrendered himself, and conformed as by the statute 5 *G. c.* 24. intituled an act for the better preventing frauds committed by bankrupts is provided; that the commissioners the 16th of *March* following certified to the lord chancellor under their hands and seals, &c. that four-fifths of his creditors in number and value, who had duly proved their debts, signed the certificate, and certified their consent to allow the said certificate, and to discharge the said bankrupt; that the 10th of *April* 1721, three of the said commissioners under their hands and seals certified the lord chancellor such signing and consent of the said creditors; that the 7th of *July* 1721 the certificate was confirmed by the lord chancellor, and was entred on record in chancery by virtue of an order of the lord chancellor made upon the petition of the bankrupt bearing date the 8th of *July* 1721; the bankrupt having first sworn, that the certificate and consent of his creditors thereto were obtained justly and without fraud, as by the certificate produced in court and by the records of the said court fully appears. To which plea the plaintiff demurred, and the defendant joined in demurrer.

This case was argued *Trinity* term last, 1728, by Mr. *Strange* for the plaintiff, and by Mr. *Joceline* for the defendant. And first, exception was took to the plea, because it did not shew, who were the petitioning creditors, nor in what sums they were creditors. Now by the act of 5 *G. 1. c.* 24. no commission is to issue on the petition of

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one creditor, unless his debt is 100*l.* nor upon the petition of two creditors, unless the debt is 150*l.* nor on the petition of three or more, unless their debt is 200*l.* and therefore that is a matter necessary to be averred, for it is traversable; for if the creditors that petitioned for the commission are not creditors to such a value, the issuing the commission will be void.

On the other side it was argued for the defendant, that it was alleged in the plea, that the commission issued *debitis juris forma*, which was sufficient, for it has been adjudged in *Lutw.* 274. *Lawson v. Lamb*, that in an action brought by assignees of commissioners of bankrupts, they need not set out the proceedings of the commission and commissioners at large. And in *Lutw.* 451. *Slaughter v. Pierrepont*, it was held that it need not appear in a plea of assignment by commissioners of bankrupts, that the bankrupt was indebted in 100*l.*

But the court held the plea naught for this exception. For as to the case in *Lutw.* 274. that was in case of a declaration brought by the assignees, wherein a short way of declaring hath been allowed upon the authority of a great number of precedents. But as to the other case in *Lutw.* 451. of a plea, that was long before the statute of 5 G. 1. c. 24. s. 20. which is express, that no commission shall issue, unless the creditors, who petition for a commission, are creditors in such sums as are mentioned for that purpose in that act. But in this plea it is so far from mentioning, in what sums the petitioning creditors were creditors, that it does not mention there was any petition at all. But by the 13 El. c. 7. s. 2. the chancellor is impowered to issue a commission only upon complaint made to him in writing.

But it was farther insisted upon by the counsel for the plaintiff, that this bond was not discharged by the act of bankruptcy and certificate within the intention of the act. Nor is the defendant aided by the act of 7 G. 1. c. 31. for explaining and making more effectual the several acts concerning bankrupts; for the 400*l.* in the condition was payable at a day after the bankruptcy committed, viz. within two months after the death of *William Donalson* the bankrupt, and upon two contingencies, viz. if *Martha Latimer* married him, and survived him. And a case was cited between *Godling* and *Godling*, *Posth.* 11 Ann. where in an action of debt upon a bond dated before the act of bankruptcy committed by the defendant, it appeared the money in the condition was not payable till after the act of bankruptcy, the defendant insisted he ought to be discharged upon common bail by virtue of the statutes about bankrupts, but it was ruled that he should be held to special bail. And the plaintiff

plaintiffs could not come to prove this debt within the 7th G. 1. c. 31. because it depends upon two contingencies.

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On the other side it was insisted on for the defendants, that this was *debitum in presenti*, though it was *solvendum in futuro*. *Cro. Jac. Neal v. Sheffield*, 254. and therefore would be barred by the act of bankruptcy and certificate, &c.

But all the judges were of opinion, that a creditor upon a bond, with condition to pay money at a future day subsequent to the act of bankruptcy, before 7 G. 1. c. 31. could not be admitted to prove such debt, or to have any dividend, before such security became payable. And that act recites it to have been a question, for remedy whereof that act was made. And it would be hard upon the former acts, to put such a construction as to bar a man of his debt, when he could not come into the commission, and have the benefit of it. Then as to the statute 7 G. 1. c. 31. that enacts, that any person who hath given or shall thereafter give credit on such security as aforesaid, [referring to the securities mentioned in the recital] to any person who was or should become a bankrupt, upon a good and valuable consideration *bona fide* for any sum of money or other matter or thing whatsoever, which should not be due or payable at or before the time of such persons becoming bankrupts, shall be admitted to prove his bond, &c. for the same, in such manner as if it was payable presently, and not at a future day, and shall receive a proportionable dividend, &c. of such bankrupt's estate in proportion to the other creditors of such bankrupt, deducting only thereout a rebate of interest, and discounting such securities payable at future times, after the rate of 5*l.* per cent. per annum for what he shall so receive, to be computed from the actual payment thereof, to the time such debt or sum of money should or would have become payable in and by such securities as aforesaid. Then follows a clause, that the bankrupt should be discharged of such securities. Now it being uncertain, whether this bond should ever become due or not, it depending upon two contingencies which had not both happened at the time of the act of bankruptcy committed, it was impossible to make such abatement of 5*l.* per cent. as the act directs; and therefore this bond, the court held, was not within that act; and therefore they were of opinion, to give judgment for the plaintiff. But Mr. *Joceline* took an exception to the declaration, that it was not averred, that the 400*l.* was not paid by the heirs of *William Donalson*, nor that the 400*l.* was still due; but only that the defendants had not paid it; which was a fatal fault. And the court being of that opinion, Mr. *Strange* moved July 10, in Trinity term 1728. for leave to discontinue upon payment of costs, which was granted.

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Afterwards the plaintiff brought a new action on the same bond against the defendants, but amended the fault in the former declaration, by averring, that the heir of *Donalson* had not paid the 400*l.* nor any body else. And the defendant amended his plea in several things; to which there was a demurrer by the plaintiff, and a joinder in demurrer; which record is entred *Mich. 2 Geo. 2. B. R. Rot.* And the cause coming on in the paper *Nov. 26.* this *Mich. term.* judgment (a) was given by the whole court upon the merits, that the plaintiff's debt was not barred by the matter comprised in the plea, because it was not within 7 G. 1. c. 31. for the reasons mentioned before.

(a) This judgment was afterwards affirmed upon a writ of error. *Vide post. 1570.*

Palmer *vers.* Ekins.

Intr. Trin.
31 Geo. 1.
R. R. Rot. 347.

S. C. Str. 817. but rather differently reported 1 Barnard. B. R. 115.

A lessee by indenture cannot plead even against an assignee any thing which is tantamount to pleading that the lessor had no interest in the premises when he made the lease. In an action of covenant such plea is bad upon a general demurrer if the declaration shews that the lease was by indenture. R. acc. ante 1154.

And will not prevent the plaintiff from having judgment.

A plea that the lessor made a conveyance in fee before the lease, with a traverse that he was afterwards seised in fee, is tantamount to pleading that he had no interest in the premises when he made the lease.

Estates of inheritance are *prima facie* presumed to continue. D. acc. T. Jon. 182. Arg. ante 174. A tenant confesses nothing which is ill pleaded. R. acc. ante 1055. 1243. D. acc. ante 1175. *Yb.* ante 18.

THE plaintiff *Henry Palmer*, as assignee of *John Palmer*, brought an action of covenant against *Elizabeth Ekins* for non-payment of rent, wherein he declared, that *John Palmer* was seised in fee of the messuage, &c. and being so seised, the 27th of *March 1716.* by indenture made between him on the one part, and the defendant on the other part, (one part of which indenture sealed by the defendant the plaintiff produces in court) demise to the defendant a messuage in the parish of *St. Michael Crooked Lane London.* for twelve years from *Lady-day 1716.* rendring 18*l.* per annum during the said term to the said *John Palmer*, his heirs and assigns, payable at four quarterly payments; that the defendant by the said indenture covenanted to pay the said rent at the days and times in the said indenture mentioned to the said *John Palmer*, his heirs and assigns; that by virtue of this demise the defendant entred, and continued possessed of this messuage, &c. till after the 26th of *March 1725.* That *John Palmer* being seised of the reversion in fee, by lease and release dated the 22 & 23 *Nov. 1723.* conveyed it to *Henry Palmer* the plaintiff in fee: then the plaintiff assigns his breach, in the defendant's not paying three quarters rent due and ending *Lady-day 1725.* The defendant, *protestando* that *John Palmer* did not make such lease, for plea says, that *John Palmer* was seised in fee of this messuage 19th of *Nov. 1706.* and being so seised by lease and release dated the 19th and 20th of *Nov. 1706.* conveyed this messuage, &c. to one *John Bragg* in fee; and traverses, *absque hoc.* that *John Palmer* ad aliquod tempus *post praedictum* 20th of *Nov. 1706.* seissus fuit de messuagio p-

dicto in dominico suo ut de feodo, modo et forma as the plaintiff declares. To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

PALMER
v.
EKING.

This case was argued at several times by Mr. serjeant Girdler, Mr. serjeant Baines, and Mr. Fazakerley for the plaintiff, and by Mr. serjeant Belfield, Mr. Usher, and Mr. Filmer for the defendant. And the 26th of Nov. 1728, I at my brothers' desire delivered the opinion of the court, that the plea was ill, and the plaintiff ought to have judgment. And we resolved,

1. That the defendant could not plead, *John Palmer nil habuit in tenementis* at the time of the lease made, to an action brought by *John Palmer*, supposing he had not conveyed to the plaintiff: because it appearing upon the face of the declaration, that the lease was made to her by indenture made between *John Palmer* and her, which she had executed; she is estopped by the indenture. And for that purpose the case of *Kemp v. Goodhall*, Pasch. 4 Annæ, B. R. ante 1154. in debt for rent by indenture, if the defendant pleads, *nil habuit in tenementis*, the plaintiff may demur and need not reply the estoppel, because it appears upon the declaration: but if the defendant plead, *nil habuit in tenementis*, and the plaintiff replies, *habuit, &c.* the jury may find the truth notwithstanding the indenture.

2. That the assignee shall take advantage of the estoppel, C. L. 352. 4 Co. 53. Privies in estate as the feoffee, lessee, &c. shall be bound and take advantage of estoppels, 1 Salk. 276. *Trevivan v. Lawrence*. If A. lease by indenture to B. lands in which he hath nothing, and afterwards A. purchases the lands in fee, and sells them to D. and his heirs, D. shall be estopped. And where the estoppel works on the interest of the land, it runs with the land, into whosesoever hands the land comes.

3. That this plea of the defendant amounted to a special *nil habuit in tenementis*, for by the inducement to the traverse she shews, that *John Palmer* in 1706, long before he made the lease to the defendant, which was in 1716, conveyed in fee to *Bragg*. If so, *John Palmer* had nothing in the messuage, &c. when he made the lease. For an estate in fee-simple is always intended to continue, unless it be shewn to be conveyed away or determined. Therefore this plea amounts to a special *nil habuit in tenementis*, which is no more to be admitted to be pleaded by a lessee by indenture, than a general *nil habuit in tenementis*. But the defendant by a proper inducement might have made this traverse good; as if he had pleaded in his inducement to the traverse,

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traverse, that J. S. was seised of the messuage in fee, and being so seised conveyed it to *John Palmer* for his life, and that *John Palmer* being so seised made the lease to the defendant, and afterwards conveyed to the plaintiff, and that then *John Palmer* died; whereby he would have shewed, that an interest pass by the lease to the defendant as long as *John Palmer* lived, and that by his death the lease was determined; then such traverse as in the present case would have been good. For the *stoppel* that appeared upon the face of the declaration, would have been avoided, by shewing an interest pass; and such plea would not have amounted to a *nil habuit in tenementis*, because an estate for life would have appeared to have been in *John Palmer*. But no interest appears to be in *John Palmer* in this case, when the lease was made to the defendant; nor can the court intend there was any interest in him, since the plea sets out a conveyance before the lease to *Bragg* in fee-simple, which estate must be intended to continue.

But it was objected by the defendant's counsel, that an assignee by *stoppel* cannot maintain an action of covenant. And for that *Moore* 419. pl. 577. so held in the case of *Nokes v. Ander*, Cro. Eliz. 373. 436, 437. where the plaintiff declared, that *John King* let the lands, 10 Eliz. to the defendant for a term of years, that the defendant granted them by indenture to one *Abell*, in which the defendant covenanted, that *Abell* and his assigns should peaceably enjoy without interruption of any person; that *Abell* 15 Eliz. assigned to the plaintiff; and then alleges farther, that long before *John King* had any thing in the land, one *Robert King* was seised thereof in fee, viz. 7 Eliz. and being so seised died seised 15 Eliz. whereupon the land descended to *Thomas King*, who entred upon the plaintiff and ousted him; and after a verdict for the plaintiff it was moved in arrest of judgment, that the plaintiff not having shewn, that *John King* had any thing, when he made the lease to the defendant, and the defendant having granted to *Abell* by indenture, nothing passed thereby, but by *stoppel*; then when *Abell* assigned to the plaintiff, nothing passed; for lessee by *stoppel* cannot assign any thing over; and then the plaintiff is not such an assignee as could maintain an action of covenant against the defendant; and the court were of that opinion, that covenant will not lie upon an assignment of an estate by *stoppel*. And that upon the whole record it appeared, that the plaintiff was but assignee by *stoppel*; for the defendant having traversed the estate laid in the declaration in *John Palmer*, the plaintiff by his demurrer has confessed the plea to be true, that *John Palmer* had not such estate, when he made the lease, as the plaintiff has alleged.

To which it was answered, that the case cited out of *Cro. Eliz.* 436. does by no means come up to the case in question. For there upon the very face of the declaration, it being alleged, that *Robert King* was seised in fee, before *John King* made the lease to the defendant, and also when the defendant assigned to *Abell*, and also when *Abell* assigned to the then plaintiff, no estate being laid to be in *John King*, when he made the lease to the defendant; it appeared to the court, that the lease from the defendant there to *Abell* was only a lease by *estoppel*, and nothing of an interest could pass thereby, and consequently nothing could pass by *Abell's* assignment to the plaintiff. But here upon the face of the declaration a good title appears in the plaintiff; and that being so, the declaration of itself is good, and the defendant by her plea pleads a fact, which by her indenture she is estopped from pleading, which makes the plea ill, and what is ill pleaded no demurrer confesses. No more than if the plaintiff declares in debt for rent by indenture, the defendant pleads *nil habuit in tenementis*, and the plaintiff demurs; this demurrer does not confess, that the plaintiff had nothing in the lands. The defendant being then estopped by her indenture, from pleading this special *nil habuit in tenementis*, the plaintiff as assignee of the land (which he must be took to be notwithstanding this ill plea) may take advantage of the *estoppel*. But in truth the case in *Croke* was adjudged for the defendant, because no breach appeared in the declaration. It was objected farther, if by possibility an interest could pass to the defendant by this lease, it could not work by *estoppel*; now though it is pleaded that *John Palmer* granted in fee to *John Bragg*, yet *Bragg* might regrant him an estate *pur autre vie*, of which he might be seised when he made the defendant the lease, so that an interest might pass during the life of *cestuy que vie*. To which it was answered, that a conveyance being pleaded from *John Palmer* to *Bragg*, it is to be presumed to continue, the contrary not being shewn.

Another objection was, that *estoppels* are odious, and not to be construed or raised by implication. The answer to which was, here was no construction by implication, but a plain *estoppel* appeared upon the face of the declaration as to the matter pleaded in this plea.

The last objection was, that the plaintiff had demurred generally, whereas if he would have took advantage of this, he ought to have demurred specially, and assigned this for cause; especially since the statute of 4 Ann. c. 16. for the amendment of the law, which enacts that the judges shall give judgment according as the very right of the cause of the matter in law appear to them, &c.

1554

PALMER
EXINS.

Mich. Term 2 Georgii 2. regis.

To which it was answered, that the right of the cause and matter in law appear to be with the plaintiff; for the court and juries are bound by *estoppels*, as when the plaintiff's title in ejectment is by *estoppel*, and the defendant pleads the general issue; such title is a good title in law. 1 Salk. 276. *Trevivan v. Lawrence*. And judgment was given for the plaintiff Nov. 26, 1728.

Thomas Bowers *vers.* Robert Man.

S. C. but with some difference, (a) Str. 879.

Intr. Mich. 13
Geo. 1. C. B.
Rot. 522. et
Pasch. 1 Geo.
2. B. R. Rot.
A certiorari in
error to verify
errors assigned
must bear teste
after the assign-
ment of errors.

THE plaintiff *Bowers* brought a writ of error upon a judgment given against him by *nihil dicit* in debt upon a bond in the common pleas. And he assigned in *Trin.* term 1728, want of an original, and want of a warrant of attorney, and one *certiorari* was directed to the chief justice of the common pleas as to the warrant of attorney, and another *certiorari* was directed to the *custos brevium* of the common pleas, which bore teste the 21st of June 1727, which was before the errors were assigned, upon which the *custos brevium* returned, that there was no original, &c. The defendant in error pleaded, in *nullo est erratum*. And judgment was affirmed, *nisi*, &c. because the plaintiff in error ought to take out a *certiorari* to verify his error, that there was no original; but this *certiorari* bearing teste before the assignment of the errors, could not be a *certiorari* upon that assignment of errors. Mr. *Strange* for the defendant in error,

(a) According to the report in Str. the *certiorari* bore teste before the writ of error, and the court held, it did not verify the errors, and could not be taken to be the writ the court had awarded.

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Hilary Term

2 Georgii 2. regis, B. R. 1728.

Emery *vers.* Bartlett.

S. C. differently reported. 1 Barnard. B. R. 123.

IN error brought by *Bartlett*, to reverse a judgment given against him by the court of record of the city of *Litchfield*, in an action upon the case upon several promises, brought by *Emery* against him, and judgment by default, and a writ of inquiry executed, and intire damages found and final judgment given. In the declaration there were two counts. The first was upon a promissory note made within the jurisdiction of the court, and subscribed by the defendant, by which he promised to pay *Emery* 59 l. 10 s. upon demand for value received. And the exception to that count was, that it was not averred, that the value was received within the jurisdiction of the court. For Mr. *Parker* for the plaintiff in error insisted, that that was the foundation of the note, and that therefore it was necessary to be received within the jurisdiction, to give the court a jurisdiction over the cause. The second count was upon an *in simul computasset*, wherein the plaintiff *Emery* below declared, that the defendant *Bartlett* accounted with her within the jurisdiction of the court, for divers sums of money, *antetunc debitis et ei adtunc aretro insolutis existentibus, &c.* And the exception to this was, that it was not averred, that the sums of money were due within the jurisdiction of the court. And it was urged, that if the debt was not contracted within the jurisdiction of the court, the laying the accounting to be within it would not be sufficient, because the accounting did not alter the nature of the debt. And for that were cited the cases of *Harrenden v. Palmer*, *Hob.* 88. *Done v. Thorn*, *Allen* 72. *Cony v. Laws*, *Stiles Rep.* 472. *Sir Thomas Jones* 47. and 2 *Lev.* 165. *Ball v. Palmer*. But the court were of opinion as to the first, that the promissory note being laid to have been made with-

Intr. Hil. 2 Geo.
2. B. R. Rot.
154.

A promissory note is binding tho' it is not given for value received. vide ante 1481.

In an action in an inferior court by the payee of a note against the maker, tho' the declaration states that the note was made for value received, it need not state that the value was received within the jurisdiction of the inferior court. vide ante 211, 795. and the books there cited.

An action in an inferior court upon an account stated need not state that the sums in arrear concerning which the parties accounted were in arrear within the jurisdiction of the inferior court. S. C. *Sir.* 827: vide ante 211, 795. and the books there cited.

EMERY
v.
BARTLETT.

in the jurisdiction was sufficient, because whether it was for value received or not it would not be material, for an action upon a promissory note payable to a man or order, though it was not for value received, is maintainable upon the statute of 3 & 5 Ann c. 9. and if value received is in the note, there is no occasion to prove that the value was paid. As to the exception to the second count, the court also over-ruled it, because the action was grounded upon the stated account, which was laid to be stated within the jurisdiction: And though the stating the account might not alter the nature of the debt, yet giving the stated account in evidence, would be good evidence to prove the declaration. And judgment was affirmed, Feb. 7, 1728.

Burroughs *vers.* Willis.

S. C. 1 Barnard. B. R. 114. Str. 822. and differently reported. Fitzg. 40.

If a barrister brings a transitory action he may lay the venue in Middlesex, and keep it there. R. acc. 2 Will. 159. acc. Burr. 2027.

THE defendant had obtained a rule to change the venue out of *Middlesex*, in an action for money received to the plaintiff's use, upon the common affidavit, that the cause of action (if any) arose in *Hampshire*. Mr. Filmer moved for the plaintiff, to discharge the rule, because the plaintiff was a barrister, and (a) master in chancery, and therefore had a privilege to lay his action in *Middlesex*, where his attendance was required, and cited 2 *Salk.* 670. *Knight v. Farnaby*. And the court being of opinion, this fell within the reason of that case, the rule was discharged. See 2 *Salk.* 668. *Seaman v. Ling.* *Corthew* 126. *Biss v. Harcourt*. Mr. Hussy for the defendant.

(a) According to the report in Str. the court declared they discharged the rule because the plaintiff was a barrister, not because he was a master in chancery.

Easter Term

2 Georgii 2 Regis, B. R. 1729.

Usher Estwick assignee of the sheriff of Middlesex against Edward Cooke.

IN debt upon a bail-bond brought by the plaintiff as assignee of the sheriff of *Middlesex*, the plaintiff declared, that after the first day of *Trinity* term *A. D.* 1706. viz. the 18th of *July* anno regni domini *Georgii 2. nunc regis, &c.* secundo, the plaintiff prosecuted *extra curiam dicti domini regis coram ipso rege (eadem curia apud Westmonasterium in comitatu Middlesex adtunc tunc existente)* a writ of *capias ad respondendum*, to the then sheriff of *Middlesex* directed; and so proceeds, and sets out the writ, the delivery to the sheriff, the warrant, arrest, and giving the bail-bond by the defendant, and the assignment to the plaintiff, &c. To which declaration the defendant demurred, and the plaintiff joined in demurrer. And Mr. *Strange* for the defendant took exception to the declaration, that it appeared thereby, that the writ was sued out in the long vacation out of term time; for the court must judicially take notice of the beginning and end of the terms, as well moveable as immoveable, and that the 18th of *July* was after *Trinity* term was ended, and therefore that the writ was a void writ, for it was not possible to be sued out of the court of king's bench then sitting at *Westminster* the 18th of *July*, when it was vacation time, no such court being then sitting at *Westminster*. And the writ being void, the arrest was illegal, and the bail-bond thereupon given void also. Mr. *Reeve* for the plaintiff insisted, that there was *veritas facti* as well as *veritas legis*. And though a writ is to be took in law, to be sued out at the time when it bears *teste*; and that is the last day of *Trinity* term, when the writ is sued out in *Trinity* vacation; yet in fact it is constant experience, and the course of the court, which is the law

Intr. Pasch. 2
Geo. 2. B. R.
Ret.

The courts will take notice of the beginning and end of a moveable term. R. acc. ante 4. vide ante 354. and the books there cited. Burr. 2586.

The court of king's bench cannot be represented to have been held at Westminster in vacation time. R. acc. Atkinson v. Anderson. B. R. E. 25 G. 3. sed vide Burr. 2586. Bl. 683.

ESTWICK
v.
COOKE.

of the court, that writs are sued out in the long vacation, though they bear *teste* the last day of *Trinity* term before. And therefore this, as it may be so in fact, so it is confessed to be so by the general demurrer, and therefore well enough. For which he cited Sir *Thomas Jones* 149. 1 *Ventr.* 362. *Walburgh v. Saltonstall*; where in a declaration a *latitat* was alleged to be sued out of the king's bench 21 *Jan.* and the jury found the writ bore *teste* 28 *Nov.* but in fact was sued out 21 *Jan.* and it being according to the truth of the fact, it was held good, and judgment was given for the plaintiff, *nisi, &c.* But the court being unanimous of opinion, that it was ill, and that it was not according to the truth of the fact, for it could not the 18th of *Jan.* be sued out of the court of the king's bench then sitting at *Westminster*, when the court did not nor could not sit out of term, the plaintiff desired leave to discontinue, which was granted him, *May* 13, 1729.

Naylor qui tam *vers.* Scott.

S. C. 1 Barnard, B. R. 159.

A custom that a person shall pay the churching fee who is never church'd is void.

A custom that a sum of money shall be paid at the usual time after a woman's delivery when she should be church'd is void for uncertainty if it does not shew what that usual time is.

IN a prohibition granted to stay a suit in the spiritual court by the vicar of *Wakefield*, grounded upon a custom for a due for churching of women, which was alleged to be this, *viz.* That every inhabitant keeping an house and having a family in *Wakefield* in *Yorkshire*, and having a child or children born in that parish, at the time of churching the mother of the child, or at the usual time after her delivery when she should be church'd, have time out of mind paid ten pence to the vicar of that parish, for or in respect of such churching, or at the usual times when the mother of such child should be church'd. Issue was taken upon the custom, and a verdict was found for the defendant, that there was such a custom. And upon motion made to the court by Mr. *Filmer* for the plaintiff, in arrest of judgment, to prevent the granting a consultation, (the court being of opinion, that it was a void custom, 1. Because it was not alleged, what was the usual time the women were to be church'd, and therefore uncertain; 2. Because it was unreasonable, because it obliged the husband to pay, if the woman was not church'd at all, or if she went out of the parish, or died, before the time of churching;) judgment was arrested; Mr. *Crowle* counsel for the defendant in the prohibition.

Trinity Term

3 Georgii 2. regis, B. R. 1729.

The King against Valentine Boyles.

S. C. Str. 836. Fitzg. 82.

IN an information in nature of a *quo warranto* exhibited by the master of the crown office as the king's coroner and attorney, &c. for usurping the office of one of the bailiffs of *Southwold* in *Suffolk*, the information set forth, that *villa de Southwold in comitatu Suffolk est antiqua villa, quodque infra villam praedictam* for ten years last past, and long before there were and yet are two bailiffs from time to time by the commonalty of the said *villae* yearly chose and to be chose, and that the office of bailiff *villae praedictae* for all the time aforesaid was and yet is *officium publicum et officium mag-nae fiduciae et praebminentiae infra villam praedictam tangens regimen et gubernationem villae illius et administrationem publicae iustitiae infra eandem villam, viz. apud villam praedictam*, and that the defendant 26 April 1 G. 2. and from thence *continue postea hucusque apud villam praedictam absque aliquo legali warranto*, &c. did use and exercise the said office, and still there uses and exercises it, and claims to be one of the bailiffs of the said *villae*, and to have and enjoy divers liberties to the said office of one of the bailiffs of the said town belonging, &c. To this information the defendant demurred, and the king's coroner, &c. having joined in demurrer, Mr. *Hussy* for the defendant insisted that a *quo warranto* was the king's writ of right, for usurping franchises and liberties, 2 *Inst.* 282. The exercise of an office may be such a franchise, as for the usurpation of it a *quo warranto* may lie, if it is a publick office; but in this case the office in the information, seems to be only a private office, for which no *quo warranto* would lie; for it is not shewn, that this *villae* of *Southwold* is a corporate town, nor is it said, so much as that it is a borough; and therefore the court cannot look upon the bailiff of

A *quo warranto* information lies in respect of any office which concerns the public.

An office touching the government of a vill, and the administration of public justice within it concerns the public.

1560

REX
v.
BOYLES.

Trinity Term 3 Georgii 2. regis.

of this town, to be an officer of a publick nature. *Sed non allocatur*; for *per curiam* there is no necessity, to set out particularly in these sort of informations, the whole constitution of the place, or to shew whether the office is by charter or prescription; but if it is alleged, to be an office, which appears upon the face of the information, to concern the publick, it is sufficient against a person that usurps it. Now here it is alleged to be a publick office, and concerns the government of the *villæ*, and the administration of publick justice, which is confessed by the demurrer. And judgment was given for the king, *June 12, 1729.*

Michaelmas Term

3 Geo. 2. regis. B. R. 1729.

Lowe against Davies and others.

Intr. Trin. 13
G. 1. B. R. Rot.

EJECTMENT for messuages and lands in *Shrewsbury* on the demise of *William Fowler* and *Mary* his wife. On not guilty pleaded, the jury found a special verdict which was very long, by finding several conveyances and common recoveries; but the question was wholly upon what estate passed by the will of *Daniel Jevon* to his youngest son *Benjamin Jevon*. The will was found at large, but the question arose upon this short case. *Daniel Jevon* the deviser, being seised of the lands in question, by his will duly executed, dated 21 June 28 Car. 2. devised part of them to his wife dame *Ann Jevon* for and during her natural life, and from and after her decease then to his son *Benjamin Jevon* and his heirs lawfully to be begotten, that is to say, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said *Benjamin*, and the heirs of the body of such first, second, third, and every other son and sons successively lawfully issuing, as they shall be in seniority of age and priority of birth, the eldest always and the heirs of his body to be preferred before the youngest and the heirs of his body, and in default of such issue then to his right heirs for ever. Other part of the lands were devised to his wife for life, and from and after her decease to his said son *Benjamin* and to the heirs of his body, as in manner and form aforesaid is expressed; but for want of such heirs, then to the use of his right heirs for ever. Other lands he devises to his eldest son *Thomas* and his heirs lawfully to be begotten, the first, second, third, and every other son and sons successively of the body of the said *Thomas* lawfully begotten, and the heirs of such first, second, and third son lawfully succeeding one another, and in default of such issue to his son *Benjamin* as

A devise to a man and his heirs lawfully to be begotten may be so far restrained by subsequent words as to pass only an estate for life. S. C. 1 Barn. B. R. 238. Str. 849. 2 Eq. Abr. 316. pl. 28. and with a trifling difference. Fitts. 112.

In a devise to J. S. and his heirs lawfully to be begotten, that is to say the first and other sons of his body lawfully to be begotten successively and the heirs of the body of such first and other sons as they shall be in seniority of age, &c. there is such a restriction, and J. S. 316. pl. 28, and with a trifling difference. Fitts. 112. notwithstanding there may be limitations in the will which contain it expressly for life. B. R. 238. Str. 849. 2 Eq. Abr. 316. pl. 28. Fitts. 112. In a will containing such a devise, a devise in the same terms omitting the words "that is to say," will have the same effect.

here-

LOWE
v.
DAYIES.

heretofore expressed, and in default of such issue to his right heirs for ever. Other lands he devised to his son *Benjamin*, and the heirs of his body lawfully to be begotten, the first, second, third, and every other son and sons successively of the body of the said *Benjamin* lawfully to be begotten, and the heirs of the body of such first, second, and third, and every other son and sons successively lawfully issuing, as they shall be in seniority of age and priority of birth, the eldest always and the heirs of his body to be preferred before the youngest and the heirs of his body, and in default of such issue then to his right heirs for ever. *Daniel Fevon* the devisor died 22d June 28 Car. 2. 1676. and left his widow and three sons, *Thomas* his eldest, *Richard* his second son, and *Benjamin* his youngest son. *Thomas* the eldest son died without issue. *Richard* the second son died, and left *Mary* the wife of *Fowler* his daughter and heir, and also right heir to *Dan. Fevon* the testator, who were lessors of the plaintiff. The defendant claimed under *Benjamin*, who after a surrender by his mother of her estate for life to him, suffered a common recovery, to the use of him and his heirs, and afterwards conveyed it to *Waring*, under whom the defendants claimed. So that the single question upon this Special verdict was, whether *Benjamin Fevon* by this will was tenant in tail, or only tenant for life? If he was tenant in tail, by the suffering the common recovery that would be barred, and also the remainder to the right heirs of his father, under which the lessor of the plaintiff claimed. But if he was but tenant for life, the recovery would not affect the reversion descended to the plaintiff but she would have a good title. *Mr. Wilbrabam* for the defendants argued, that the testator knew the difference between devising an estate for life, and an estate in tail; for in several parts of the will he gave to his wife an express estate for life; but to *Benjamin* he did not give it only for his life, but to him and the heirs of his body, which was undoubtedly an estate tail in a will, and therefore that estate could not be defeated by the subsequent words. For where an express estate is given by a will, that shall not be defeated by subsequent words by an implication. *Dier* 171. *1 Vent.* 231. *Cro. Eliz.* 248. *Atkins v. Atkins*. And as to the first devise to *Benjamin* (tho' there is some difference in the penning that and the subsequent devise to him) a (a) *videlicet* may correct or restrain what went before, or explain it; but if it is contrary to what went before, it must be rejected as void. *Hob.* 171. Now it was insisted on, an express estate tail being given to *Benjamin* by the first words, and no express estate for life, the *viz.* that comes after, and the subsequent words in the other devises, cannot turn that only into an estate for life in *Benjamin*, with intails to his sons successively; for what follows the *viz.* and the other devises to the sons, is contrary to the express devise to *Benjamin*. *Sed non allocatur*;

(a) Vide ante
256, and the
books there
cited.

catur; for *per curiam*, the whole will must be took together, and one part explained by the other; and the intent was most manifest, that the devisor in all the devises of the lands in question designed to give *Benjamin* only an estate for life, and not an intail; and the *viz.* and the other clauses, were not contrary, but explanatory of what *heirs of the body of Benjamin* the devisor meant. And judgment was given for the plaintiff *Novem.* 18, 1729, by the unanimous opinion of all the judges. *Mr. Willes* was counsel for the plaintiff.

LOWE
v.
DAVIES.

Henry Haydock *vers.* Roger Lynch.

Intr. Mich. 3
G. 2. B. R. Rot.

IN an action upon the case upon several promises, the plaintiff in his first count declared, that one *Thomas Rogers* 8 Aug. 1728. &c. according to the custom of merchants his certain bill of exchange with his own hand and in the name of the said *Thomas* subscribed did make, dated the same day and year, and directed the said bill of exchange to the said *Roger*, and thereby requested the said *Roger* to pay to the said *Henry* or his order 14*l.* 3*s.* out of the fifth payment, when it should become due, and it should be allowed by the said *Thomas*, which was afterwards accepted by the defendant, *ratione quorum praemissorum* the defendant became liable to pay the said 14*l.* 3*s.* to the plaintiff *Henry*, and so being liable promised to pay, &c. Then there were other counts in the declaration, to which counts the defendant pleaded *non assumpsit*, &c. and as to this count the defendant demurred. And it was insisted upon by *Mr. Parker* for the defendant, that this action was not maintainable upon this bill as a bill of exchange, according to the resolutions in the cases of *Jocelyn v. Laserre*, Pasch. 1 Geo. 1. B. R. [ante, 1362.] and *Jenney v. Herle*, Pasch. 10 Geo. 1. B. R. 1724. [ante, 1361.] And of that opinion was the court, and Nov. 20, 1729. gave judgment for the defendant. *Mr. Strange* for the plaintiff.

An order for the payment of money out of a particular fund is no bill of exchange. Vide Bayley 3, 4.

Intr. Mich. 2
G. 2. C. B. Rot.
544. et Mich.
3 G. 2. B. R.
Rot.

If the statement
of the assignment
of a bail bond
shews that the
sheriff assigned it
according to the
form of the
statute it is un-
exceptionable
after a judgment
by default, tho'
it does not shew
that he assigned
it by indorse-
ment attested,
&c.

Henry Mifflin *alias* Peters and others *vers.*
Sir William Morgan.

IN error upon a judgment by *nihil dicit* in debt upon a bail-bond, penalty 500*l.* obtained by the plaintiffs *Mifflin* and others against Sir *William Morgan* as assignees of the sheriff of *Gloucester*, the error assigned was, that the plaintiffs did not shew, that the sheriff assigned the bond to them by indorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses, according to the words of the statute of 4 *Ann. c. 16. s. 20.* but only alleged, that the sheriff at the request and costs of the plaintiff in the suit, according to the form of the statute in that case lately made and provided, did assign to the plaintiffs the said bond, which Mr. *Strange* insisted for the plaintiff in error was not sufficient, without shewing particularly, that the bond was assigned as the act directed, by indorsement, &c. But the court unanimously over-ruled this exception; all defects, which would have been aided by a verdict, being aided after judgment by *nil dicit* by that act of 4 *Ann. c. 16. s. 2.* for amendment of the law, and it being expressly alleged, that the bond was assigned *secundum formam statuti*. Mr. *Parker* for the defendants in error. And judgment was affirmed, Nov. 18, 1729.

The King *against* the Mayor, Aldermen and
Burgesses of Doncaster in the county of York.

S. C. 1 Barnard. B. R. 264.

The chamber-
lain of a corpo-
ration cannot be
removed from
the office of a
capital burgess
for misconduct
as chamberlain.
vide ante 225.
*Rex v. Mayor,
&c. of London*
B. R. T. 25 G.
3.
None of the
members of a
corporation can
be removed upon
a general charge
of obstinately
refusing to obey
several orders
and laws made by the corporation for the good of the corporation. R. acc. Say 37. The members of a corporation have no: of common right a power to remove any of the members of the corporation. R. acc. Say. 37. D. acc. Cowp. 503, 504. Burr. 538. vide Dougl. 144. 30. Burr. 517.

A *Mandamus* was granted, directed to the mayor, aldermen and burgesses of *Doncaster*, commanding them to restore *Christopher Scot* to the office of a capital burgess of that corporation. To which they made a return, whereby it was set out, that the corporation was a corporation by prescription, &c. and that several charters had been granted to them by several kings, by one of which their last name was made, that of mayor, aldermen and burgesses, &c. that by letters patent of 16 *Car. 2.* he appointed a mayor, twelve aldermen, and twenty-four capital burgesses, which mayor, aldermen and capital burgesses, were thereby appointed to be the common-council of the corporation: by the same letters patent the mayor was appointed to be chose out of the aldermen, and the aldermen out of the capital burgesses, and the capital burgesses out of the

R. acc. Say 37. The members of a corporation have no: of common right a power to remove any of the members of the corporation. R. acc. Say. 37. D. acc. Cowp. 503, 504. Burr. 538. vide Dougl. 144. 30. Burr. 517.

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free burgesſes, in a particular manner mentioned in the letters patent; then they returned, that time out of mind there had been three chamberlains of the ſaid borough, one called the *ſenior* chamberlain, another the middle chamberlain, and the other *junior* chamberlain of the ſaid borough, which till the granting the charter of *Charles* the Second had been always choſe by the whole body out of the burgesſes, and from the making that charter had been choſe by the mayor, aldermen and capital burgesſes, out of the capital burgesſes; which chamberlains reſpectively continued from their elections three years; and that the firſt year ſuch perſon was called the *junior* chamberlains, the ſecond year middle chamberlain, and the third year *ſenior* chamberlain; and that the buſineſs of the ſecond chamberlain was to take care of the lands and poſſeſſions of the corporation, and to receive the rents, &c. and to give a true account of them: then the return ſets out, that after *Scott* was choſe a capital burgeſs, and took the oath, which was ſet out at large, which was, among other things, well and truly to ſerve the mayor, aldermen, and burgesſes of the borough, as one of the capital burgesſes thereof, and well and truly to perform and keep all ſuch orders and by-laws as are or ſhould be made by the mayor, aldermen, and capital burgesſes, for the good government of the borough, and in all things according to his power truly and faithfully to ſerve the mayor, aldermen and burgesſes, for the moſt benefit of the corporation and inhabitants; then the return ſets out, that *Scott* 23 May 1718, was choſen chamberlain, that he became middle chamberlain, and took upon him the execution of that office 1719, that he as middle chamberlain received ſeveral ſums of money of the tenants of the corporation, mentioning them particularly, due to the corporation, of which he gave no account, &c. but concealed and detained them to his own uſe, and as middle chamberlain charged the corporation with ſeveral ſums of money as laid out for them, which he never laid out, mentioning them alſo particularly; and that he, while he was a capital burgeſs and chamberlain of the ſaid borough, obſtinately and voluntarily reſuſed to obey ſeveral orders and laws by the mayor, aldermen and burgesſes, for the good of the ſaid borough made, contrary to the duty of his office of capital burgeſs, and contrary to the tenor of his oath, contrary to the truſt repoſed in him, &c. that the mayor, aldermen, and capital burgesſes afterwards, viz. &c. in common-council aſſembled, ordered that *Scott* ſhould answer the ſeveral articles, matters, miſbehaviours and offences aforeſaid, and that he had notice of them in writing, and was ſummoned to appear at a particular day to answer them; that he did appear, and put in his answer, and was heard, ſhould not be removed from his office of capital burgeſs, that a further day was given him, when he was heard again; that a further day was given him, to ſhew cauſe why

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for the misbehaviours and offences aforesaid, at which day *Scott* appeared at the common council then held, and was heard again, and upon examination and consideration had by the mayor, aldermen, and capital burgeses in common-council then assembled, of all and singular the premisses, as well of the articles, matters, misbehaviours, and offences aforesaid, laid to the charge of the said *Scott*, as of the matters and answers he alleged in his defence; and upon examination of witnesses it appeared to them, the mayor, aldermen, and capital burgeses in council assembled, that *Scott* was guilty, &c. *ideo* they then and there adjudged, he should be removed, &c. and did then and there remove him, from his office of capital burges, for his said offences and misbehaviours, &c. After argument by Mr. *Bastle* against this return, and by Mr. *Fazakerley* for it, Nov. 28, 1729. the court unanimously awarded a peremptory *mandamus*, to restore *Scott* to the office of a capital burges. For they held first, that it did not appear sufficiently by this return, that *Scott* had misbehaved himself in the office of a capital burges. For as to the charge, that he had obstinately and voluntarily refused to obey orders and laws, &c. contrary to the duty of his office, and his oath; that was too general a charge, for the particular laws ought to have been specified. But what he was charged with in this return related to his office of chamberlain, and not to his office of capital burges, viz. not accounting for the rents he received, and charging them with payments which he never made; and therefore this might have been a good reason to remove him from the office of chamberlain, but not of a capital burges. 2. They had not returned, that the mayor, aldermen, and capital burgeses, which was the common-council, had a power to remove. The charter does say, the capital burgeses shall continue in for life, unless removed; but it does not say by whom that removal is to be made. 11 Co. 99. 1 Roll. Rep. 224. *Palm. 451. Stiles 477*: are authorities, that a (a) freeman shall not be removed by a corporation, unless by virtue of a charter or prescription. But if the mayor, aldermen, and capital burgeses, could be looked on as having an authority to remove a capital burges, because he was chose by them; yet the court held, this was not a sufficient cause to remove him from that office, for the reasons before-mentioned.

(a) R. cont.
Burr. 517.
which see Dougl.
144. D. cont.
Str. 820. Comp.
503, 504. Say.
38.

Easter Term

3 Georgii 2. regis, B. R. 1730.

The Mayor, Aldermen and Burgeſſes of
Baſingſtoke *againſt* Vaughan Bonner.

Intr. Hil. 3
Geo. 2. B. R.
Rot.

S. C. Str. 864.

IN debt for 800 *l.* rent in arrear due from the defendant to the plaintiffs upon a lease by indenture made by them to the defendant, he pleaded his privilege as an attorney of the common pleas in this manner, *viz.* that he, the day of exhibiting the plaintiff's said bill, and long before *et continuo abinde hucusque, fecit* [instead of *fuit*] *et adhuc exiſtit*, an attorney of the common pleas, &c. To which plea the plaintiffs demurred, and the defendant joined in demurrer. And judgment was given, that the defendant should answer over, because the defendant had not averred, he was an attorney of the common pleas the day of the exhibiting the plaintiff's bill, by reason of the mistake of the word *fecit* instead of *fuit*, May 5, 1730.

An allegation that a man at the time of the commencement of an action *fecit* and *adhuc exiſtit* an attorney, does not import that he was an attorney when the action was commenced.

James Stewart Esq. Henry Rowe and Elizabeth his wife *verſ.* Smith et al' bail of Solomon Ranger.

Intr. Mich. 3
G. 2. B. R. Rot.
339.

S. C. Str. 866.

IN a *ſcire facias* which bore *teſte* 6 Nov. 3 Geo. 2. returnable Monday proximo poſt *oraſtinum ſancti Martini*, ſued by the plaintiff againſt the defendants as bail for Solomon Ranger, &c. the defendants pleaded, that the plaintiffs after their judgment recovered, and before the ſuing out of the *ſcire facias*, &c. had not ſued out a *capias ad ſatisfaciendum* againſt Ranger, &c. To which the plaintiffs replied, that after their obtaining their judgment againſt Ranger, and before the ſuing out of the firſt *ſcire facias* againſt the defendants, *viz.* 23d of October the ſame Mich. term 3 Geo. 2. they ſued

A *ſcire facias* may be ſued out againſt bail on the day on which the *capias* ad ſatisfaciendum againſt the principal is returnable. And bear *teſte* on that day. R. acc. Crunkſhank v. Steward. B.R. H. 17 G. 3.

3 G 3

out,

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out, &c. against the said Ranger a *capias ad satisfaciendum* returnable *Thursday proximo post crastinum Animarum* [which was the 6th of Nov. the same day the first *scire facias* bore *teste*] at which day the Sheriff returned, that Ranger *non est inventus*, &c. prout *idem breve et retorum inde* among the files of writs of *capias ad satisfaciendum* in the said court de *recordo remanentia*, &c. The defendants demurred generally, and the plaintiffs joined in demurrer. And Mr. Strange for the defendants insisted, that this was ill, because the *scire facias* was *teste* the same day the *capias ad satisfaciendum* was returnable, whereas the *capias ad satisfaciendum* ought to be returned before the *scire facias* was sued out; but it did not appear to be so, because being both on the same day, there is no fraction of a day. *Sed non allocatur*; for in many cases the law takes notice of fractions of days; and here it should be took, that the *capias ad satisfaciendum* was returned, before the *scire facias* was sued out; which might very well be, though both on the same day. Judgment for the plaintiff, May 1, 1730.

Intr. Trin. 2
& 3 Geo. 2.
C. B. Rot. 645.
et Intr. Pasch.
3 Geo. 2. B. R.
Rot.

A declaration against a man for causing water to flow thro' pipes near the foundation of the plaintiff's house, and neglecting to repair them, so that the water flowed thro' them and sapped the foundation of the plaintiff's house is unexceptionable after verdict, tho' it does not expressly state that the pipes were the defendant's, that he laid them there, or that he is bound to repair them.

In such action the plaintiff need not set forth his title to his house: his sufficient for him

to shew that he was possessed of it. vide ante 266, 333, and the cases there cited.

John Hoare against Rivers Dickinson. Error.
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JOHN Hoare the plaintiff in the common pleas brought an action upon the case against Dickinson, and declared, that he the 1st of July 1 Geo. 2. was lawfully possessed of two ancient messuages and two ancient sheds, situate in the parish of St. Andrew Holborn in comitatu Middlesex, and being so possessed, he afterwards, *scilicet* the same day and year, pulled down the said ancient messuages, and built in their place four other messuages upon the ground, or part thereof, where the ancient messuages stood, and the plaintiff of the said four new built messuages the said 1st of July anno secundo aforesaid, and always from thence until and after the second of December anno secundo *supradicto*, was lawfully possessed: and whereas the defendant the said first of July anno secundo *supradicto*, and always from thence until and after the said second of December, was possessed of a brewhouse in the parish of St. Sepulchre's London, and being so possessed, and the said John Hoare being possessed of the said four new built messuages, the defendant *machinans et malitiose intendens*, &c. the said first of July and divers days and times between the said first of July and the said second of December, *quendam cursum aquae per mabere mia tubulata deductum a quodam fonte* in the said parish of St. Andrew Holborn to the defendant's brewhouse *continuavit, et currere causavit* near

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the foundation and underpinning of the plaintiff's said four messuages, *ac maheremia tubulata illa tam negligenter manutenuit, reparavit et custodivit, quod aqua a fonte illo per eundem Dickinson in maheremiis tubulatis illis deducta, dictis diebus et vicibus ex maheremiis tubulatis illis, at the said parish of St. Andrew's Holborn, ad et in murum, fundamentum et sustentationem* of one of the said four messuages of the plaintiff's so new built *irruerat et profuebat, per quod* the said messuage and two other of these messuages of the said plaintiff to the said messuage near adjoining *in muribus suis ac in telis eorundem magnopere debilitata et damnificata fuerunt*, and the plaintiff to support and repair them *ex causa illa* was forced to expend 300*l. &c.* Upon not guilty pleaded, and issue joined, the jury found for the plaintiff, and gave him damage 203*l.* besides costs; for which sum, and for 25*l.* 10*s.* costs, judgment was given for the plaintiff John Hoare in the common pleas. Upon which judgment the defendant brought a writ of error in the king's bench, and assigned the general error. And Mr. Draper argued for the plaintiff in error, that this action was not maintainable against him, because the defendant was not to be compared to a *terre-tenant*, who may be obliged to keep his fences, &c. in repair, according to the case of *Tenant v. Gouiding*, 1 Salk. 360. but had only an easement in having this water come to his brewhouse. And it is not alledged, that the pipes were his, or that he laid them there; and therefore he was not obliged to repair them, and by consequence was not answerable for any damage that might accrue to the defendant in error by reason of the pipes being out of repair. In the next place, if the plaintiff in error was to be looked upon as owner of the pipes (which he is not alleged to be in the declaration) then the plaintiff's declaration is ill, because the defendant in error has not set out a good title to the four messuages, but has only alleged that he was *legitime possessionatus*, which though it might be good against a *tort-feasor*, yet would not be good against a *terre-tenant*, 1 Salk. 335. *Star v. Rookeby*. But the court were of opinion, that the action well lay, for it is alleged, that the plaintiff *machinans et malitiose intendens eundem Johannem in hac parte minus rite praegravare, &c. cursum aquae, &c. continuavit et currere causavit* near the foundation of the houses of the defendant in error, &c. *per quod, &c.* so that he is plainly a wrong doer, and has by his continuing and causing this water to run near, &c. damaged the defendant in error, which the jury have found. And therefore judgment was affirmed, April 18, 1730.

James Tully *against* Francis Sparkes and Christopher May, executors of William Donalson.

In an action of debt if there is no writ of inquiry to ascertain the damages sustained by the detention of the debt, those damages as well as the costs of the suit should be stated to be given with the assent of the plaintiff. S. C. but no decisive opinion.

1 Barnard. B. R. 325. 335. vide ante 176 2 Ro. Abr. 673. l. 53. Str. 1159. 2 Will. 248. 368. 374. 3 Will. 62.

But the omission of such statement may be supplied at any time. S. C. Str. 867. S. C. 1 Barnard B. R. 325. 335. A writ of error from the king's bench into the exchequer chamber does not remove the record, but only a transcript of it. S. C. b. t. with a contrary determination.

1 Barnard. B. R. 325. v. de Doug. 338. n. 3.

A court of error cannot amend the transcript of a record so as to make it vary from the original.

But the court in which the record remains may amend it notwithstanding a transcript of it may be in a court of error.

S. C. Str. 867. 1 Barnard. B. R. 325. 335.

THE defendants the executors brought a writ of error upon this judgment (which see before, 1546.) in the exchequer chamber; where it was argued for them by Mr. *Jocelin*, not only that the judgment was erroneous upon the merits, but also that there was an error in the entry of the judgment; for the entry was, *ideo consideratum est*, that the plaintiff recover against the defendants his debt aforesaid, *ne non 22 l. pro damnis suis quae sustinuit tam occasione detentionis debiti illius quam pro missis et custodiis suis per ipsum circa sectam suam in hac parte appositis, eidem Jacobo per curiam dicti domini regis nunc hic adjudicatis, de bonis et catallis quae fuerunt, &c.* Which was insisted upon to be erroneous, because it was not, that the taxing of the damages was *ex assensu* of the plaintiff, for the words *ex assensu suo* after *per curiam dicti domini regis nunc hic* were omitted; which ought to be in, as appears by all the precedents in the books of entries. For the taxation of the damages *occasione detentionis debiti*, as well as of the costs of suit, being by assent of the plaintiff (which is always entred of record) will conclude the defendant; but if the plaintiff will not consent to this, then he shall have a writ of inquiry of the damages *occasione detentionis debiti*, if he will; but this is in the plaintiff's election, and not in the election of the defendant, in judgment in actions of debt upon default or confession, 2 *Saund.* 107. *Holdip v. Orwoy*. And the same reason holds in judgment in debt upon a demurrer. And the justices and barons in this case seemed strongly of opinion, that by reason of this omission in the entry of the judgment, the judgment was erroneous. Then it was moved in the exchequer-chamber, that they would let the record be amended. But the court held, they could not amend it; but if it was amendable, it must be in the king's bench. Whereupon Mr. *Harpur* moved for the plaintiff in the original action, that the judgment might be amended, by inserting the words *ex assensu suo*. And a rule was made, for the defendants to shew cause, &c. And Mr. *Jocelin* came to shew cause why the rule ought to be discharged. And first that the record was not in this court, but that it was removed by the writ of error into the exchequer-chamber, and was there now. And for this he insisted upon the words of the statute of 27 *El.* c. 8. which requires the chief justice of the king's bench to cause the record to be brought before the justices of the common pleas, &c. The writ of error also requires the record to be

carried

carried before the justices, &c. 1 *Andersf.* 143. *Sed non allocatur*; for the court held, the record remained here, notwithstanding the writ of error in the exchequer-chamber, and that it was only a transcript sent thither, *March 72. Palm.* 198. and that if this defect is amendable by law, it must be amended in this court. *Cro Jac.* 429. Then Mr. *Jocelin* and Mr. serjeant *Eyre* insisted, that this could not be amended, because this is not barely *vitium clerici*, but an error in matter of judgment. Besides they said the application for the amendment was too late, the cause having been twice argued in the exchequer chamber. But *contra*, serjeant *Chapple* and Mr. *Harpur* argued, that this was amendable by virtue of the statute of 16 & 17 *Car.* 2. c. 8. whereby it is enacted, that no judgment shall be reversed, by reason that the costs in any judgment whatsoever are not entred to be by consent of the plaintiff, but that such omissions, and all other matters of like nature, &c. shall be amended by the judges of the court where such judgment shall be given, or whereunto the record is or shall be removed by writ of error. And they insisted, that the omission in the present case of *ex assensu* of the plaintiff as to taxation of damages *occasione detentionis debiti* was of the like nature as that of costs not entred to be with assent of the plaintiff. And of this opinion was the court, and the amendment was granted, *May 2, 1730.* And in *Trinity* term following, upon Mr. *Harpur's* motion the transcript of the record in the exchequer-chamber was amended by the record of the king's bench. And in that term the judgment of the king's bench was affirmed in the exchequer chamber by lord chief justice *Eyre*, *Price* and *Denton*, justices of the common pleas, and *Carter*, *Comyns* and *Thompson*, barons of the exchequer, *Fortescue* justice being absent and doubting, and *Reynolds* being absent, having joined in the judgment in the king's bench.

Trinity Term

3 & 4 Georgii 2. regis, B. R. 1730.

The King *against* Clendon.

S. C. Str. 870. 1 Barnard. B. R. 337. 2 Seff. Caf. 24.

A man cannot be prosecuted upon one indictment for assaulting two people. Cont. Burr. 984.

THE defendant was indicted for an assault and battery committed by the defendant upon J. S. and J. N. and upon not guilty pleaded a verdict was found for the king, that the defendant was guilty, &c. And a motion was made in arrest of judgment by Mr. Ketelbey for the defendant, that these were two distinct batteries, and two distinct offences, for which the defendant ought to have been indicted by several indictments, and that they could not be joined in the same indictment; for as the offences were several, so the judgments ought to be several, and distinct fines set upon the defendant in respect of them. Upon which a rule was made, to stay judgment, until, &c. And Mr. Taylor for the prosecutor moved to discharge the rule; for although he agreed, J. S. and J. N. could not have joined in an action for these batteries, yet they might be well enough put in the same indictment, because the court would consider them as different indictments, and might very well give different judgments, and set different fines. But the court held, that as no case was cited, nor precedent, to warrant such an indictment, it was ill for the reasons given by Mr. Ketelbey. And judgment was arrested absolutely, Saturday, May 30, 1730.

Coppin *vers.* Gunner.

With an inconsiderable difference. Str. 873. 1 Barnard. B. R. 339. 341. 356.

The court will give a man leave to serve a felon with process, tho' he is under sentence of death and likely to have his sentence changed for transportation, if the felony did not occasion any forfeiture, and the party applying will undertake not to sue out execution against his person.

GUNNER was convicted of an offence within the black act, viz. shooting at a person, &c. and sentence of death pronounced against him; but my brother Fortescue, before whom he was tried, reprieved him, in order that a letter of the secretary of state might be obtained for his transportation.

tation.

ation, according to 4 G. 1. c. 11. f. 1. And Mr. *Wheat* moved in behalf of *Coppin*, to whom *Gunner* was indebted, that he might have leave to serve *Gunner* in gaol with a copy of a *latitat*, to intitle the plaintiff to file common bail for him, if he did not cause an appearance to be entred, it being alleged, that *Gunner* had an estate fallen to him; there being a *proviso* in the act of 9 Geo. 1. c. 22. that offenders against that act should not incur corruption of blood, nor a forfeiture of lands, tenements, goods or chattels. And last term a rule was made for the gaoler and *Gunner* to shew cause. And upon hearing counsel this term, the rule was made absolute, and leave given to *Coppin* to serve *Gunner*, according to the motion; it being no prejudice to the gaoler, and there being no reason, that the defendant should not pay his debts, if the plaintiff could recover, and find effects; he undertaking not to sue execution against the person of *Gunner*, and that consent being made part of the rule.

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Michaelmas Term

4 Georgii 2. regis, B. R. 1730.

Intr. Trin.
3 Geo. 2.Rex *vers.* Huggins.

S. C. Str. 882. with the arguments of the counsel in B. R. 1 Barnard. B. R. 358. 396. with the arguments of the counsel at Serjeant's inn. Filz. 177. and with the evidence 9 St. Tr. 111.

*Tis murder in a gaoler or any person employed under him to cause a prisoner's death by duress.

*Tis duress, to put a prisoner against his will in an unwholesome and dangerous room. Seeing the prisoner in such room and permitting him to continue there will not make the gaoler answerable for the duress, unless he knew that the prisoner was there against his will.

The principal shall never answer criminally for the act of his

deputy, unless it was done with his consent or by his command. The appointment of a deputy discharges the principal from all the duties of his office, till he resumes it. vide ante 658. The accidental presence of the principal does not suspend the deputation, or throw the duties of the office for the time upon the principal. On a special verdict in a criminal case the court can make no inference with respect to facts not found: they can only judge on the facts found. If such verdict finds all the facts it does find *positively*, and they do not constitute the crime of which the party is indicted, he must be acquitted. Q. Whether a *venire facias de novo* can be granted on account of the uncertainty of a special verdict in a capital case. vide 1 Barnard. B. R. 398. On the indictment of a gaoler and his servant for the murder of a prisoner by duress, the jury found that the servant put him against his will in a room newly built, the walls of which were made of brick and mortar, and very damp, and situated over the common sewer of the prison, and over the place where the filth of the prisoners was usually put, by reason whereof the room was unwholesome, and dangerous to the life of any person detained in it, and kept him there till his death without fire or chamber pot, close-stool or any such utensil; that the servant knew the room was newly built and so situated, and that the walls were of brick and mortar, and damp, that the gaoler knew the room was newly built and that the walls were of brick and mortar, and damp, that he once saw the prisoner in the room under the duress of imprisonment, and turned away, and that as he turned away the servant locked the prisoner in, that the prisoner died of that duress, and that the gaoler had at the time a deputy, and the court held the servant guilty, the gaoler not.

the space of six weeks then next following, unlawfully, &c. imprisoned and detained; and him the said *Edward Arne* then and there with force and arms, &c. for all the time last mentioned in that room *absque solamine ignis necnon sine aliqua matula schapio, vel aliqua alio hujusmodi utensili* unlawfully, &c. forced to remain and be (the walls of the aforesaid room made of bricks and mortar at the aforesaid time of the imprisonment of the said *Edward Arne* in the same being very moist, and the room aforesaid being situate over the common sewer of the said prison, and near the place *ubi fordes et finus prisonae praedictae necnon excrementa prisonariorum praedictorum adtunc usualiter posita fuerunt*, by reason whereof the room aforesaid then was very unwholesome and greatly dangerous to the life of any person detained in the same: and the indictment farther sets forth, that the said *James Barnes* and *John Huggins* at the said time of the imprisonment of the said *Edward Arne* in that room, well knew that the said room had then been newly built, and that the walls of that room, being made of bricks and mortar, were then very moist, and that the said room was so situate as aforesaid: and the indictment farther sets forth, that the said *Edward Arne*, during the imprisonment and detaining aforesaid in the said room, *viz.* the seventh of *November*, &c. by duress of the same imprisonment and detaining became sick, and thereby from the same seventh day of *November*, until the seventh day of *December* then next following in the room aforesaid languished, on which said seventh day of *December* the said *Edward Arne* by duress of the imprisonment and detaining aforesaid in the room aforesaid died, &c. the indictment farther sets forth, that the said *John Huggins*, being a person of a cruel nature and savage disposition, and a grievous and inhuman oppressor of the prisoners in the same prison under his custody being, during the said imprisonment and detaining of the aforesaid *Edward Arne* in the room aforesaid, *viz.* the said seventh day of *November*, &c. and divers other days and times during that imprisonment and detaining at *London*, &c. feloniously, wilfully, and of his malice aforethought, was present, aiding, abetting, comforting, assisting and maintaining the aforesaid *James Barnes*, feloniously, wilfully, and of his malice aforethought, the said *Edward Arne* in manner aforesaid to kill and murder: and so the jurors aforesaid upon their oath aforesaid say, that the said *James Barnes* and *John Huggins* the said *Edward Arne* in manner and form aforesaid feloniously, wilfully, and of their malice aforethought did kill and murder, against the peace, &c. On not guilty pleaded by the prisoner *Huggins* the jury find a special verdict as follows. That queen *Anne* by her letters patent bearing date the 22d of *July* in the twelfth year of her reign granted to *John Huggins* named in the indictment the office of warden or keeper of the *Fleet*, and keeper of the prison and gaol of the *Fleet*, situate, &c. and of the prison-

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ers then committed or to be committed to the prison and gaol of the *Fleet* aforesaid, and the capital messuage for the custody of the prisoners, and thirteen messuages in the parish aforesaid, and all other messuages, &c. and all that rent, fee or salary of 7*l.* 12*s.* 1*d.* yearly payable and to be paid by the hands of the sheriffs of her city of London and her county of *Middlesex*, &c. and all other rents, &c. and him the said *John Huggins* warden or keeper of the *Fleet* and of the prison and gaol of the *Fleet* aforesaid, for herself, her heirs and successors, did make, ordain and constitute, by the same letters patent; to have, hold, enjoy and exercise the said office, messuages, lands, &c. to the aforesaid *John Huggins* by himself or by his sufficient deputy or deputies, for and during his natural life, in as ample manner and form as Sir *Jeremy Whitcheott*, baronet, or any other warden of her prison of the *Fleet* aforesaid, the said office and other the premisses or any of them had before had, held, used or enjoyed, or ought to have had, held, used or enjoyed; with the usual averments: and they further find, that the said *John Huggins* 1 Sept. in the twelfth of the late king, and for divers years before and continually from thence after until the first of *January* then next following, was warden or keeper of the said prison of the *Fleet*; and that one *Thomas Gibbons* for all the same time was deputy of the said *John Huggins* in the said office of warden or keeper of the prison of the *Fleet* aforesaid by the same *John Huggins* appointed, and acted as such his deputy: and they further find, that *James Barnes* in the indictment named for all the same time was servant of the said *Thomas Gibbons*, deputy of the said *John Huggins*, in the same office so as aforesaid being, and acted under the same *Thomas Gibbons*, &c. in and about the care of the prisoners committed to the said prison, and in the same prison being, and particularly in and about the care of *Edward Arne* in the indictment named then and there a prisoner in the same prison being: they farther find, that the said *James Barnes* the seventh of *September* in the twelfth year, &c. in and upon the said *Edward Arne*, a prisoner in the same prison then as aforesaid being, in manner and form as in the said indictment is specified, made an assault and him the said *Edward Arne* then and there without his consent in manner and form as in the said indictment is specified took, and him the said *Edward Arne* to a certain room within the said prison then newly built, in the same indictment mentioned, without his consent in manner, &c. conveyed and led, and him the said *Edward Arne* in the said room for a long time, to wit for the space of forty-four days from thence next following, without the consent of him the said *Edward Arne* in manner, &c. imprisoned and detained, and him the said *Edward Arne* then and there for all the time last mentioned in that room, *absque solamine ignis necnon sine aliqua matula scaphis vel aliquo alio hujusmodi utensili*, to remain and be without his

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his consent in manner, &c. forced; and they farther find, that the walls of the said room were made of bricks and mortar, and at the said time of the imprisonment of the said *Edward Arne* in the same were very damp, and that the said room was situate over the common sewer of the said prison, and near the place *ubi sordes et finus prisonae praedictae necnon excrementa prisonariorum praedictorum adiuncte usualiter posita fuerunt*, by reason whereof the said room was then very unwholesome, and greatly dangerous to the life of any person detained in the same: and they farther find, that the said *James Barnes* at the said time of the imprisonment of the said *Edward Arne* in that room well knew that the said room had then been newly built, and that the walls of that room were made of bricks and mortar, and were then very damp, and that the said room was situate so as aforesaid: and they farther find, that during the said imprisonment and detaining of the said *Edward Arne* in the said room, to wit, by the space of fifteen days at least before the death of the said *Edward Arne*, the said *John Huggins* (a) knew, that the said room had been then newly built, and that the walls of that room were made of bricks and mortar, and then were damp; but whether the said *John Huggins* knew that, on the said 7th day of *September* in the twelfth year, &c. the jurors know not: and they farther find, that the said *Edward Arne* during the said imprisonment and detaining of him the said *Edward Arne* in the said room, to wit, the tenth day of the same month of *September* in the twelfth year aforesaid, by dures of the same imprisonment and detaining became sick in the said room, and thereby from the same tenth day of *September* in the twelfth year aforesaid until the twentieth day of *October* then next following in the said room languished, on which said twentieth day of *October* in the twelfth year aforesaid the said *Edward Arne* by dures of the said imprisonment and detaining in the room aforesaid died, to wit, at *London*, &c. and they farther find, that during the imprisonment and detaining of the said *Edward Arne* in the said room, to wit, by the space of fifteen days at least before the death of the said *Edward Arne*, the said *John Huggins* was once present at the said room, and then and there saw the said *Edward Arne* in that room, under the dures of the said imprisonment, and then and there turned away, and the said *James Barnes* locked the door of the same room at the same time in which the said *John Huggins* turned away as aforesaid (the same *Edward Arne* at the said time in which the said door was locked by the said *James Barnes* being in the said room under dures of the said imprisonment): and they further find, that the said *Edward Arne* in the said room under dures of the said imprisonment remained and was continued from the said time in which the said door of the

(a) According to the report in Str. 883. the finding was that Huggins knew the condition of the room.

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said room was so locked by the said *James Barnes* as aforesaid until the said time in which the said *Edward Arne* so as aforesaid died: and they farther find, that the said *John Huggins* sometimes acted as warden or keeper of the said prison, during the time in which he the same *Thomas Gibbons* was deputy of the said *John Huggins* in the said office as aforesaid; but whether upon the whole matter, &c.

The record of this indictment and special verdict being removed into the king's bench by *certiorari*, it was argued on *Tuesday* the sixteenth of *June* 1730 by Mr. *Willes* for the king, and Mr. serjeant *Eyre* for the prisoner. And on the last day of *Michaëlas* term following, after the case had been argued on the fourteenth of *November* at *Serjeants-inn-hall* before all the twelve judges, the lord chief justice delivered the opinion of the judges.

In this case two questions have been made. 1. What crime the facts found upon *Barnes* in the special verdict will amount to? 2. Whether the prisoner at the bar is found guilty of the same offence with *Barnes*?

1. As to the first question, it is very plain, that the facts found upon *Barnes* do amount to murder in him. Murder may be committed without any stroke. The law has not confined the offence to any particular circumstances or manner of killing; but there are as many ways to commit murder, as there are to destroy a man, provided the act be done with malice, either express or implied. *Hale P. C. 46. 3 Inst. 52.* Murder is, where a person kills another of malice, so he dies within a year and a day. *Hale P. C. 43.* And malice may be either expressed or implied. In this case the jury have found the malice express: for the facts charged on *Barnes* are laid in the indictment to be *ex malitia sua praecogitata*, to wit, that he having the custody of *Arne* assaulted him, and carried him to this unwholesome room, and confined him there by force against his will, and without his consent, and without proper support, *ex malitia sua praecogitata*; by means of which he languished and died. And the jury have found, that *Barnes* did all these facts, *modo et forma prout in indictmento praedicto specificatur.*

But upon the finding of these facts there is also a plain malice arising in construction of law. *Hale P. C. 46.* The law implies malice in respect of the person killing. If a prisoner by duress of the gaoler comes to an untimely end, it is murder. It is not necessary, to make it duress, that there should be actual strokes or wounds. And in *3 Inst. 35.* the putting into a dungeon is duress, or into a place too strait, *3 Inst. 91. plus arrement que devoit, Cromp. 90.* The untimely end, mentioned by lord chief justice *Hale*, is what is meant by *Briton, cap. 11. fol. 18.* If a man die in prison, the coroner is to take an inquest upon the view of the body; and if it is found by the inquisition, that the person was brought nearer to death, and farther from life, *per dure gard del gaoler*, it is felony.

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The reasons, why the law implies malice in such cases, are plain. Because it is a breach of his duty, and of the trust which the law has reposed in him. A prisoner is not to be punished in gaol, but to be kept safely. *Flet.* 38. *Bract.* 105. The act also is deliberate. And the nature of the act is such, as that it must apparently do harm. It is also cruel, as it is committed upon a person that cannot help himself. And it is committed by force, and without the consent of the prisoner. So that the charge in the indictment against *Barnes* is murder, and these facts found in the verdict as to him fully maintain the indictment, and amount to murder. But *Barnes* is not before the court, he having fled (as it is said) from justice.

2. The next question is, whether the prisoner *Huggins* is found guilty of the same offence as *Barnes*; or how far it appears by this special verdict, that he has been aiding and assisting to *Barnes* in the committing of these facts.

In the indictment the offence is as strongly charged upon *Huggins* as upon *Barnes*. The indictment charges, that the prisoner at the bar, during the imprisonment of *Arne* in the said room (the situation and condition of which the indictment expressly charges *Huggins* to have the knowledge of) on the seventh of *November*, *et diversis diebus et vicibus* during that imprisonment, feloniously, voluntarily, and of his malice aforethought, was present, aiding, abetting, comforting, and assisting the said *Barnes*, the said *Arne* feloniously and of his malice aforethought, to kill and murder, &c. which, if found by the verdict, would certainly be murder in the prisoner. But there is a great difference in the finding of the verdict. As to *Huggins*, the jury have only found these facts, *viz.* That he had the office of warden of the *Fleet*, &c. granted to him by letters patent of 22 July, 12 Ann. to hold for his life, and to execute by himself or his deputy: that he 1 Sept. 12 G. 1. and before, and from thence to 1 January 12 Geo. 1. was warden of the *Fleet*: that *Thomas Gibbons* was, and for all that time acted as his deputy in that office: That *James Barnes* was for all that time servant of *Gibbons*, and acted under him about the care of the prisoners, and particularly about the care of *Arne*: then they find, that *Barnes* assaulted, and carried by force, the said *Arne* into the room, and kept him there against his consent, *prout* in the indictment, forty-four days: then they find the situation and condition of the room, whereby it was very unwholesome, and dangerous to the life of any person kept therein: that *Huggins*, during the imprisonment of *Arne* in that room, *viz.* for fifteen days before *Arne's* death, knew that the room was then lately built, and that the walls were made of brick and mortar, and were then damp; but whether he knew it the seventh of September, ignorant: that *Arne* the tenth of September 12 Geo. 1. by duress of imprisonment became sick, and languished to the twentieth of October, and then died by duress of imprisonment

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ment in the said room: that during the imprisonment of *Arne* in that room, viz. *per spatium quindecim dierum ad minus* before his death, *Huggins* was once present at that room, and then saw the said *Arne* in that room *sub duritie imprisonamenti praediecti, ac adtunc et ibidem se avertit*, and the said *James Barnes*, the same time as *Huggins* turned himself away, locked the door, the said *Arne* at the time when the said door was locked by *Barnes* being in the said room *sub duritie imprisonamenti praediecti*; and that *Arne* remained under that duress till his death: that *Huggins* acted sometimes as warden, during the time *Gibbons* was deputy; but it is not found that he acted as warden during the confinement of *Arne*.

The judges are all unanimously of opinion, that the facts found in this special verdict do not amount to murder in the prisoner at the bar; but as this special verdict is found, they are of opinion, that he is not guilty. Though he was warden, yet it being found, that there was a deputy; he is not, as warden, guilty of the facts committed under the authority of his deputy. He shall answer as superior for his deputy civilly, but not criminally. It has been settled, that though a sheriff must answer for the offences of his gaoler civilly, that is, he is subject in an action, to make satisfaction to the party injured; yet he is not to answer criminally for the offences of his under-officer. He only is criminally punishable, who immediately does the act, or permits it to be done. *Hale's P. C.* 114. So that if an act be done by an under-officer, unless it is done by the command or direction, or with the consent of the principal, the principal is not criminally punishable for it. In this case the fact was done by *Barnes*; and it no where appears in the special verdict, that the prisoner at the bar ever commanded, or directed, or consented to this duress of imprisonment, which was the cause of *Arne's* death. 1. No command or direction is found. And 2. It is not found, that *Huggins* knew of it. That which made the duress in this case was, 1. *Barnes's* carrying, and putting, and confining *Arne* in this room by force and against his consent. 2. The situation and condition of this room. Now it is not found that *Huggins* knew these several circumstances, which made the duress. 1. It is not found, that he knew any thing of *Barnes's* carrying *Arne* thither. 2. Nor that he was there without his consent, or without proper support. 3. As to the room, it is found by the verdict, 1. That the room was built of brick and mortar. 2. That the walls were *valde humidae*. 3. That the room was situate on the common sewer of the prison, and near the place where the filth of the prison and excrement of the prisoners were usually laid, *ratione quorum* the room was very unwholesome, and

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the life of any man kept there was in great danger. But all that is found with respect to the prisoner's knowledge is, that for fifteen days before *Arne's* death he knew that the room was then lately built, *recenter*, that the walls were made of brick and mortar, and were then damp. But it is not found, nor does it appear, that he knew, they were dangerous to a man's life, or that there was a want of necessary support. Nor is it found, that he directed, or consented, that *Arne* should be kept or continued there. The chief thing relied upon is, that the verdict finds, that once the prisoner at the bar was present at the room, and saw *Arne sub duritie imprisonamenti praedicti, et se avertit, &c.* which, as was objected, made him an aider and abettor. But in answer to this, 1. Being present alone, unless he knew all the circumstances, and directed that *Arne* should continue, or at least consented that he should, cannot make him an aider or abettor in the murder. *Kelynge* 113. A man may be present and be intirely innocent. He may be casually present. 2. The verdict is, *vidit sub duritie imprisonamenti praedicti*. He might see him, and see him while he was *sub duritie imprisonamenti praedicti*, that is, while he was in fact under the duress by *Barnes*; but it does by no means follow from thence that he knew that the man was under this duress, and it is not found that he did know it. It was objected, that if he saw the man under this duress he must know it, and it was his duty to deliver him. But we cannot take things by inference in this manner. The *vidit* does not imply a knowledge of the several facts that made the duress. If the nature of this duress be considered, it is impossible that it should be discovered by one sight of the man. It consists of several ingredients and circumstances, that are not necessarily to be discovered upon sight. For though he saw *Arne* in the room, yet by the view he could not tell, that he was there without his consent, and by force, or that he wanted necessary relief. It is not found, that the man made any complaint to him, or that any application was made to him on the man's behalf. If he was there with his consent, it would take off the duress. His seeing is but evidence of his knowledge of these things at best, and very poor evidence too. And therefore the jury, if the fact would have borne it, should have found, that *Huggins* knew, that *Arne* was there without his consent, and that he consented to and directed his continuance there. Which not being done, we cannot intend these things, nor infer them. For in special verdicts in criminal cases the court must never intend, nor infer facts, but judge upon the facts found, and not on the evidence of the facts. *Kelynge* 78. Whether a man is aiding and assisting in murder or no, is a matter of fact, and ought to be expressly found by the jury. *Kelynge*, 111. *Rex v. Plummer*. It does not appear by the special verdict there, that *Glover*, or the person unknown,

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who shot off the gun, did discharge it against any of the king's officers; but it might be, for ought that appears, for another purpose: though upon the particular circumstances in the special verdict there are things found, which were a sufficient evidence, that the gun was discharged against the king's officers; and so it might be reasonably intended, considering they were all armed and in prosecution of an unlawful act in the night, which they designed to justify and maintain by force, especially when the gun was shot off upon the watch word given, and as the king's officers were endeavouring to seize the wool: the jury thereupon might well have found, that the fusée was discharged against the king's officers. But since they had not found it, the court were confined to what they had found positively; and were not to judge the law upon evidence of a fact, but upon the fact when it is found. See *Kelynge* 218.

This case was so well argued on both sides, that some objections on the part of the crown must be taken notice of, though they are already in a great measure anticipated. As,

1. That *Huggins*, as warden, though he had made a deputy, had still the care of the prisoners; and it was incumbent on him, to see that there was no illegal durefs. And to explain what the law means by durefs, *Brit. cap. 11. fol. 18.* was cited. If a prisoner is brought nearer to death, and farther from life, *per dure gard del keeper*: and *Stauf. P. C. lib. 1. cap. 35.* If he keeps him more strictly than of right he ought, it is durefs. And the durefs need not be by the hand of the gaoler; for if it is done with his privity it will affect him. But that is a mistake: for when an officer has power to make a deputy, and has appointed a deputy he has discharged himself of the whole care; the (a) deputy has the whole power, and it is incumbent upon the deputy, till the principal resumes his office. Indeed when the principal comes to execute his office himself, the power of the deputy ceases: but a bare accidental coming to the place will not determine the deputation, unless he comes with an intent to resume his office. The case of a disseisor coming to dine with the disseisor, or to see his pictures, may be very properly compared with this.

(a) Vide ante
658.

2. It was objected, that this murder was done with his privity; it is found, that he saw *Arne* under this 'durefs, *et se evertit*. He ought to have taken notice of it and removed him, as it was his duty to take care of his prisoner's life. *Vidit sub duritie*, implies that he knew it; and therefore he was privy to the durefs, of which *Arne* died.

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But his consent to this dures is not found; it entirely depends on his seeing the man, which does not import his consent, for want of his knowledge of the particular facts.

3. Objection. When he was present, the power of his deputy ceased; and then he should have eased the man of this dures; and his suffering him to continue afterwards under the same dures, infers that he knowingly suffered him to continue till his death; and his not reforming this abuse, implies his consent to it. But these inferences are by much too strong; and the not reforming an abuse, does by no means infer a consent to all the consequences of it.

4. Objection. A person absent may be principal in murder, as in the case of poisoning. An infant was laid in a hog-stye, and a sow eat it; and held murder. *Palm.* 547, 548. The same opinion in the case of a sick man laid in the cold. So in the case of laying an infant under leaves in an orchard, and a kite struck it. *Poph.* 13. *Ow.* 98. *Hale P. C.* 53. There the person who did the act, occasioned the death; but in this case no act was done by the prisoner at the bar. There are indeed cases of murder, where no act was done by the persons guilty; as the letting loose a wild beast, which the party knows to be mischievous, and he kills a man. 3 *Edw.* 3. *corone*, 311. *Staunf.* 17. *Crompt.* 24. *b.* the owner of the beast is guilty of murder. In answer to those cases; there is a difference between beasts that are *ferae naturae*, as lions and tygers, which a man must always keep up at his peril; and beasts that are *mansuetae naturae*, and break though the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner has had notice of the quality of the beast; in (a) the former case an action lies without such notice. (a) Vide ante 109. 606. As to the point of felony, if the owner have notice of the mischievous quality of the ox, &c. and he uses all proper diligence to keep him up, and he happens to break loose, and kills a man; it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad, after warning or notice of his condition, it is the opinion of *Hale*, that it is manslaughter in the owner. And if he did purposely let him loose, and wander abroad, with a design to do mischief; nay, though it were but with a design to fright people and make sport, and he kills a man; it is murder in the owner.

5. Objection. It is found, that *Barnes* shut the door in the presence of *Huggins*; and therefore the continuing of *Arne* under that confinement will affect *Huggins*. But there is no consent found to his confinement. What is

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found is at most but evidence of a consent; and even not that. It is only *vidit et se avertit*.

(a) R. acc. ante
3485.

6. Objection. It is not necessary, for the jury to find the consent in express words; and if facts are found, that amount to a consent, the court will judge it a consent. As in the case of malice, the court will judge it upon the facts found; and malice is an act of the mind, as well as consent. To this it is answered, that malice is matter of law, and (a) proper for the court to judge; but the consent of one man to the malicious acts of another is matter of fact, which ought to be found by the jury. And here is no consent found, nor that *Huggins* aided or abetted *Barnes*; nor is there any positive fact found, that must necessarily be construed an aiding and abetting.

There is another matter which the king's counsel insisted upon, That if the court were of opinion, that they could not give judgment upon the facts found in this verdict, that the prisoner was guilty of murder; that yet the verdict was so uncertain, as that they could not give judgment of acquittal; and therefore that a *venire facias de novo* ought to go. And this brought it under the consideration of the judges, whether a *venire facias de novo* ought to be granted in this case. And to speak to that point the counsel on both sides were heard before all the judges, on Wednesday the twenty-fourth instant.

It was said by the counsel for the king, that they spoke to this point without prejudice. For they insisted, that as to the verdict itself, there were sufficient facts found affecting the prisoner, to induce the judges to be of opinion, that they amounted to murder. But for argument's sake, in case the judges should be of opinion, that they were too uncertain, to found a resolution upon, that the prisoner was guilty of murder; then they argued, that a *venire facias de novo* ought to go, though it was in a capital case.

1. In a civil case if a verdict is found so uncertainly and ambiguously, as that no judgment can be given; a *venire facias de novo* must issue. *Co. Lit.* 227. 2 *Roll. Abr.* 693. *Venn v. Howell.* *Cro. Car.* 322.

It was observed, that the book of *Co. Lit.* 227. speaks of verdicts in general, and does not say in what cases; but as to civil cases there is no doubt.

2. In criminal cases writs of *venire facias de novo* have been granted. *Co. Intr.* 393. b. *Hil.* 4 *Car.* 1. *B. R. ret.* 32. *Rex v. Fisher.*

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3. In capital cases a *venire facias de novo* must go. 1. In cases of mistrial. 6 Co. 14. a. *Arundel's* case, the point agreed. 2. For misbehaviour of the jury in giving their verdict. *Hil. 8 Hen. 7. rot. 3. Placit. Reg. Rex v. Wayner.* Agreed. 3. As to granting a *venire facias de novo* after a special verdict found, they were so candid as to own, that though there was search made with the greatest diligence, yet they could not find one instance, nor so much as an opinion of a judge, except what was said by lord chief justice *Holt* in the case of the *King v. Keite*, *Comb. 408.* *Holt* says, "I should not be much against a *venire de novo*." And this was remembred by some others that heard that opinion.

(a) The jury had found in that case, that the prisoner had killed the man: but it did not certainly appear, whether the fact was murder or manslaughter. Mr. Attorney-general insisted, that if there was such an uncertainty, as that no judgment could be given, in a capital case; the same reason held in such case, as in civil and other criminal cases, though there is no precedent of it as yet; for *ubi eadem est ratio est eadem lex*. And therefore supposing (for in this it was argued upon a supposition) that the verdict was too uncertain to give judgment against the prisoner; they insisted, that a *venire facias de novo* ought to go.

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(a) Vide ante
141. Fitz. 137.
1 Barnard.
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see also Str. 387.
1 Barnard.
B. R. 398.

But the judges came to no resolution, that a *venire facias de novo* could not issue after a special verdict in any capital case; it being unnecessary for them to determine that question. For, as every special verdict depends upon the particular finding of the verdict, so the present question relates only to the present verdict before us as found. And as to that we were all of opinion, that this verdict was not so uncertain, as that judgment could not be given upon it. For the facts found are all positively found; but those facts in the nature of them, joined together, are not sufficient, to make the prisoner guilty of murder. And if so, then the prisoner must be acquitted; for it is not that the verdict is uncertain, but it is not full enough to convict him. Perhaps the jury might have found other facts, which they have not; but the court can judge only upon what is found. [*Kelyng. 78, 79.*] We all agreed in the case of *Green* and *Bedell* on a special verdict, that the verdict was not full enough as to them for us to judge it treason in them; because the verdict only found, that they were present, and found no particular act of force committed by them; and did not find, that they were aiding and assisting to the rest: and it is possible, they might be there only out of curiosity, to see; and whether they were aiding and assisting is matter of fact, which ought to be expressly found by the jury, and not left to the court upon any colourable implication: and accordingly those two persons were discharged. And

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yet as to *Green*, he was found to be among the persons assembled, &c. casting up his cap, and hallowing, with a staff in his hand; and that whilst he was among them, he was knocked down by a party of the king's soldiers, that came to suppress them, and was then taken. And as to *Bedell*, it was found, that he was there, and being pursued by one of the king's soldiers, called out to the rest of the company, to face about, and not to leave them.

Upon the whole, there is no authority against the court's giving judgment of acquittal, upon a verdict that is not sufficient to convict; and therefore this verdict, not finding facts sufficient to make the prisoner guilty of murder, he must be adjudged not guilty. And he was discharged.

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4 Georgii 2, regis, B. R. 1731.

Giles Gardiner *against* Stephen Merrott.

3. C. Str. 902. 1 Barnard, B. R. 462.

Intr. Hil. 4 Geo.
2. B. R. Rot.
441.

IN a writ of error brought by *Gardiner* to reverse a judgment given by the court of common pleas against him in an action of assault and battery brought against him by *Merrott*, the writ of error described the record to be of a *loquela* in the common pleas by writ by *Stephen Merrott* and *Giles Gardiner*, and the record removed was between *Stephen Merrott* and *Giles Gardiner*, and by consequence there was a variance, &c. But the court of king's bench, May 28, 1731. this term made a rule, that the writ of error should be amended, and made agreeable to the record, by virtue of the statute of 5 G. 1. c. 13. intituled, An act for amendment of writs of error, &c. s. 1. And they held, they could do it by that act without prayer of either party, the variance appearing to them upon the record; and they gave no costs, because the statute has directed no costs to be given on such amendment.

If a writ of error appear to the court to vary from the record, the court will amend it ex officio without costs.

Trinity Term

5 & 6 Geo. 2. regis, B. R. 1732.

Moses Burry *vers.* Jeffrey Perry.Intr. Mil. 4 Geo.
2. B. R. Rot.

In an action for words which are actionable in themselves, if the damages are under 40s. the plaintiff shall have no more costs than damages, tho' the declaration may contain a charge of special damage. S. C. Str. 936. R. acc. Burr. 1682, Bl. 1062.

In an action for words which are actionable only in respect of the special damage, he shall have full costs, whatever the amount of the damages may be. R. acc. ante §31.

S. C. 2 Barnard. B. R. 79, 84, 113, 155.

IN an action for words brought by the plaintiff against the defendant, the plaintiff set out in his declaration, that he was a house-smith by trade, and that the defendant spoke the words of him (which words were actionable in themselves) by reason of the speaking which words the plaintiff had lost several customers, naming them particularly, &c. to his damage 100*l*. On the general issue pleaded, the jury found for the plaintiff, and gave him only five shillings damages. And serjeant *Belfield* moved, that the plaintiff might have full costs, though the damages were found under 40*s*. because he had received a special damage, *viz.* the loss of his customers; so that if the words had not been actionable of themselves, this action would have been maintainable, by reason of the special damage. And he cited two cases between *Philips* and *Fish*, and *Carter* and *Fish*; where in an action for words importing felony, as he stole my hens, &c. and, as he said, laid by way of aggravation of damages, that he carried him before a justice of peace, and caused him to be imprisoned, &c. the jury gave under 40*s*. damages; and yet after several motions in court, *Trin. 11 Geo. 1. B. R.* the court made a rule, the plaintiff should have full costs. But *per curiam*, where the words are not actionable, but the action is maintained by reason of special damages the plaintiff has sustained upon account of the words, the plaintiff shall have full costs, though the damages are under 40*s*. for 'tis not the words, but the special damage is the cause of the action. 1 *Salk.* 206. *Brown v. Gibbons*. But where the words are actionable of themselves, as in the present case, and special damages are laid by way of aggravation, and damages are under 40*s*. there shall be no more costs than damages, for that is properly an action for words within the statute of 21

Jac.

Jac. 1. c. 16. And as to the cases cited of *Carter and Fish* and *Philips v. Fish*, upon considering that declaration the court held, that as it was laid, it was not barely laid in aggravation of damages, but was a distinct cause of action, importing *crimen feloniaci impostuit*, and therefore the plaintiff there had full costs. In this principal case the court directed, the plaintiff should have no more costs than damages. *Tuesday June the 13th, 1732.*

Bury
v.
Penny.

Wigley against Peachy, Keddon, and others.

Intr. Pasch.
Geo. 2. B. R.
Ret.

THE plaintiff brought an action of trespass, for taking with force and arms, 7 Aug. 1731, his goods and chattels, viz. 100 bushels of beans, 20 cabbages, &c. at Gosport in the county of Southampton, and carrying them away, to his damage 40 l. The defendant as to the force and arms, &c. pleaded not guilty: upon which issue was joined. And as to the rest of the trespass they justify, as bailiffs to Richard lord bishop of Winchester, the taking the beans, &c. in a piece of ground called the market-place at Gosport in the said county of Southampton, of which the bishop was seised in right of his bishoprick, then and there damage-tenant as a distress, &c. The plaintiff replied, that king George the First, by his letters patent dated the 10th of April in the third year of his reign, granted to Jonathan then lord bishop of Winchester and his successors, that they might have and hold three markets upon Tuesday, Thursday and Saturday, in every week for ever at Gosport aforesaid, for buying and selling flesh, fish, and other provisions, and all manner of goods and merchandizes commonly bought and sold in markets, with all tolls and other profits to those markets belonging. Then he sets out, that before the time when, &c. viz. Saturday the said 7th of August, a market at Gosport aforesaid, in the said piece of ground called the market-place, was held by the bishop of Winchester by virtue of the said letters patent; and that the plaintiff before the time when, &c. to wit upon the said Saturday the 7th of August, did bring into the said piece of ground called the market-place at Gosport aforesaid, into the said market there as aforesaid then held, the goods in the declaration, being goods commonly bought and sold in markets, to expose them to sale and sell them: and the said goods in the said piece of ground in the market there then held did expose to sale; as he well might; which goods were in the said piece of ground in the market aforesaid so by the plaintiff exposed to sale, until the defendants of their own wrong afterwards, viz. the said 7th of August, during the said market so as aforesaid held, the said goods in the said piece of ground in the said market so as aforesaid exposed to sale, took and carried away, &c. The defendants, after

The owner of the soil on which a market is held cannot distrain for damage-tenant goods laid down there for sale tho' the owner of them has not paid him any recompence for laying them there.

Semb. acc. 1
Wils. 107. Str.
1238. Bl. 1116.
vide Bl. 1120.

WIGLEY
v.
PEACHT.

after having prayed and had *oyer* of the letters patent mentioned in the replication, by which the markets were granted to *Jonathan* bishop of *Winchester* and his successors, with general words of all tolls and other profits to the said markets belonging, rejoin and say, that the plaintiff, before and at the time the said goods were taken at *Gosport* aforesaid, unjustly and without any reasonable cause claimed to bring the said goods into the said piece of ground called the market-place into the said market there held and to be held, and to lay them upon the ground there and to expose them to sale and sell them in the said market, without payment of any toll for the same, and absolutely refused to pay toll for the same; whereupon the defendants as bailiffs for the said bishop of *Winchester* at *Gosport* aforesaid requested the plaintiff to carry his said goods in the declaration mentioned out of the said piece of ground called the market-place. But the plaintiff then and there refused so to do; *per quod* the defendants as bailiffs of the said bishop of *Winchester* the said goods then and there took there damage-feasant as as a distress for the damage, and impounded them, &c. To this rejoinder the plaintiff demurred specially, and the defendants joined in demurrer.

Mr. *Draper* for the plaintiff argued, that judgment ought to be given for him, because it appears by the replication, that the plaintiff carried the goods and chattels mentioned in the declaration into a public market, to expose them there to sale and to sell them; that in public markets all subjects have right to bring in their goods; and though where toll is due they will be obliged to pay the toll, yet if they do not, that will not make them trespassers for bringing in their goods, nor can the owner of the market distrain them damage-feasant. *Cro. Eliz.* 75. The mayor of *Launceston*'s case; and *Cro. Eliz.* 628. *Sawyer v. Wilkin*; where it was held by the court, that the ox-hide brought into *Leadenhall* market and sold, could not be distrained damage-feasant. And as to the matter insisted upon in the rejoinder by the defendants, that they took the goods as a distress for not paying of toll, Mr. *Draper* insisted, that the rejoinder could not be supported, because they did not shew, that any, and what toll was due, which ought to be set out, that the court might judge whether the toll demanded was reasonable. 2 *Inst.* 222. And that toll was only payable by the buyer without special custom, which was not pretended in this case. 2 *Inst.* 220, 221. 2 *Lutw.* 1329, 1336. *Light v. Pym*; nor that any toll was demanded by the defendants of the plaintiff in particular. And Mr. serjeant *Belfield*, who was counsel for the defendants, gave up the rejoinder as naught, and not to be maintained. But then he took exceptions to the replication, that that had not avoided the matter pleaded in bar, because he insisted upon

it that the plaintiff ought to pay stallage, or shew that he had tendred it, otherwise he could not bring his goods into the market; and cited 2 *Roll. Abr.* 123. *Mich.* 15 *Jac.* *B. R. Newington Fair's* case; where it was held, if *A.* has a fair in a place, those who have their houses next adjoining to the fair cannot lawfully open their shops to sell their goods in the fair, but stallage is due for it, for they cannot take any benefit of the fair without paying the duties which belong to him that purchased the fair, and stallage and pickage is incident to the soil in a market or fair, *Moore* 474. *Heddy v. Wheelhouse*: and therefore it appearing by the defendant's plea, that the place where, &c. was the bishop of *Winchester's* freehold, and that the defendant brought his goods into the market; yet since it did not appear that he had paid or tendred stallage, the defendants might lawfully take them as a distress for damage-feasant, for the plaintiff was thereby become a trespasser *ab initio*.

WIGLEY
PEACHY.

But to this Mr. *Draper* for the plaintiff answered, that the defendants have no where shewn, stallage was demanded and refused, but rely only upon a non-payment of toll in their rejoinder; and farther, that if it was due and demanded, yet the not paying it would not make the plaintiff a trespasser *ab initio*. So is *Six Carpenters* case. 8 *Co.* 146. *b.* that non-feasance, where a man does an act by authority in law, as in this case where the plaintiff carried his goods to sell into market, will not make him a trespasser *ab initio*; but if stallage was due, the defendants ought to have an action or proper remedy for that, and not distrain the goods damage-feasant. And as to the principal case, he relied on the cases in *Cro. Eliz.* 75, & 628. as in point. Of which opinion were my brothers *Page* and *Probyn*, and myself, brother *Lee* being absent for sickness; and judgment was given for the plaintiff, *nisi*, &c. *June* 16 this term, But it was never moved again.

1000



A circular seal or stamp, likely a library or archival mark, featuring a central emblem and text around the border. The emblem in the center appears to be a coat of arms or a similar heraldic design. The text around the border is partially legible and seems to include "THE UNIVERSITY OF" at the top and "LIBRARY" at the bottom.

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T A B L E
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The Principal Matters

CONTAINED

IN THE SECOND VOLUME.

Abatement.

A *Pluries homine replegiando* abated for want of the words, *ad ipsorum A. et B. damnum non modicum et gravamen* Page 903

A bill abated as to one trespass, and stand good as to another 926

Suscipit super se ordinem militarem, good pleading in abatement, and without a *venue* 1014

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The form of concluding a temporary bar is, *si responderi debeat quousque*, &c. 1056

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Plea in abatement, that does not give a better writ, is bad 1178

That another person is administrator, and not the plaintiff; may be pleaded in bar, but not in abatement 1207

Where a matter of bar may be pleaded in abatement 1208

It is no plea in abatement, that the cause accrued after the action brought 1249

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 3 I A blank

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A blank left for the word *debiti* in the *distringas*, amended by the *venire*

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